

**COMPREHENSIVE AGREEMENT  
TO DEVELOP, DESIGN, FINANCE,  
CONSTRUCT, MAINTAIN AND  
OPERATE THE ROUTE 495 HOT  
LANES IN VIRGINIA**

**DATED AS OF APRIL 28, 2005**

***BY AND AMONG***

**VIRGINIA DEPARTMENT OF TRANSPORTATION,  
a Department of the Commonwealth of Virginia**

***AND***

**FLUOR ENTERPRISES, INC.,  
a California corporation**

***AND***

**TRANSURBAN (USA) INC.,  
a Delaware corporation**

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This **COMPREHENSIVE AGREEMENT TO DEVELOP, DESIGN, FINANCE, CONSTRUCT, MAINTAIN AND OPERATE THE ROUTE 495 HOT LANES IN VIRGINIA** (this "Agreement") is made and entered into as of April 28, 2005 by and among:

- (1) the **VIRGINIA DEPARTMENT OF TRANSPORTATION** (the "Department"), a department of the Commonwealth of Virginia (the "State"), the address of which Department is 1401 East Broad Street, Richmond, Virginia 23219;
- (2) **FLUOR ENTERPRISES, INC.**, a California corporation ("Fluor") (*f/k/a* Fluor Daniel), the address of which is 100 Fluor Daniel Drive, Greenville, South Carolina 29607-2762; and
- (3) **Transurban (USA) Inc.**, a Delaware corporation ("Transurban"), the address of which is c/o CT Corporation System, 1209 Orange Street, Wilmington, Delaware 19801, which is wholly owned subsidiary of Transurban Limited, an Australian corporation ("Transurban Limited").

## ARTICLE 1

### RECITALS

- 1.1. On March 25, 1995, the Governor of the State signed into law, effective July 1, 1995, the Public-Private Transportation Act of 1995, Sections 56-556 through 56-575 of the Code of Virginia (as amended, the "PPTA").
- 1.2 In enacting the PPTA, the General Assembly found and declared, among other things, that:
  - 1.2.1 there is a public need for timely acquisition or construction of and improvements to transportation facilities within the State that are compatible with State and local transportation plans;
  - 1.2.2 such public need may not be wholly satisfied by existing ways in which transportation facilities are acquired, constructed or improved; and
  - 1.2.3 the authorization of private entities to acquire, construct, improve, maintain and/or operate one or more transportation facilities may result in the availability of such transportation facilities to the public in a more timely or less costly fashion, thereby serving the public safety and welfare.
- 1.3 The PPTA grants the Department the authority to allow private entities to acquire, construct, improve, finance, and/or operate qualifying transportation facilities if the Department determines there is a need for the facilities and private

involvement would provide the facilities to the public in a more timely and cost-effective fashion.

- 1.4 The PPTA allows for both solicited and unsolicited project proposals.
- 1.5 On July 1, 1995, the Department adopted procedural guidelines developed by the Commonwealth Transportation Commissioner (the “Commissioner”) for the selection of solicited and unsolicited project proposals for negotiation under the PPTA, and on April 1, 2001, the Department adopted revised guidelines (the “Implementation Guidelines”).
- 1.6 On April 6, 2002, the Governor signed legislation (2002 Va. Acts ch. 593) amending the PPTA to permit tolls to be levied on existing interstate highways that are reconstructed to provide for increased capacity.
- 1.7 Pursuant to the PPTA, on June 26, 2002, Fluor submitted an unsolicited conceptual proposal (the “Conceptual Proposal”) to the Department for improvements to approximately 14 miles of I-495 from the American Legion Bridge to the Springfield Interchange by, among other things, adding high-occupancy toll lanes, which collectively the Department refers to as the Route 495 HOT Lanes in Virginia.
- 1.8 In accordance with the Implementation Guidelines, the Department duly posted and published notice of the Conceptual Proposal and referred it to the Initial Review Committee for preliminary review. No competing proposals were received in response to the posted and published notice.
- 1.9 Following a determination by the Initial Review Committee that the Conceptual Proposal merited further review, on July 17, 2003, the Commonwealth Transportation Board (the “CTB”), adopted a resolution approving the Conceptual Proposal for further evaluation. The Deputy Secretary of Transportation invited a detailed proposal for consideration by the Public-Private Transportation Advisory Panel (the “Advisory Panel”) in accordance with the Implementation Guidelines.
- 1.10 On September 29, 2003, Fluor filed with FHWA a notice of intent to apply for credit assistance for the Route 495 HOT Lanes in Virginia under the Federal Transportation Infrastructure Finance and Innovation Act (“TIFIA”).
- 1.11 On October 1, 2003, Fluor submitted its detailed proposal (the “Detailed Proposal”) to the Advisory Panel for consideration.
- 1.12 The Advisory Panel evaluated the Detailed Proposal using the “Proposal Evaluation and Selection Criteria” set forth in the Implementation Guidelines. Based on such evaluation, on June 28, 2004, the Advisory Panel recommended to the Commissioner that the Detailed Proposal for the Project be further developed pursuant to the PPTA.
- 1.13 Thereafter, at the direction of the Commissioner, negotiations with Fluor for a comprehensive agreement with respect to the Project commenced. Pursuant to a letter dated October 5, 2004, the Department’s Chief Engineer acknowledged that Transurban Limited, a participant on Fluor’s Project team that intends, through

Affiliates thereof, to provide an investment in the Project and certain operations and customer services, would be a participant in such negotiations.

- 1.14 The proposed Route 495 HOT Lanes in Virginia project is, for purposes of this Agreement, described on Exhibit B attached hereto (the “Project”).
- 1.15 The Project is among the alternatives being considered in an ongoing Environmental Review Process by the Department for the FHWA, except that the portion of the Project consisting of Phase VIII of the Springfield Interchange was included as part of a completed environmental review and related record of decision in accordance with Section 102 of NEPA with respect to the Department’s Springfield Interchange project.
- 1.16 On March 8, 2005, the Cooperative Agreement by and between FHWA and the Department dated September 25, 2003 (as amended, the “Value Pricing Agreement”), was amended to, among other things, include the Project in the Commonwealth of Virginia Value Pricing Pilot Program Proposed Scope of Work.
- 1.17 On April 22, 2005, FHWA (a) approved the Department's Work Plan for the Project under Special Experimental Program 14 for Innovative Contracting (the “SEP-14”), which contemplates that the Department will negotiate a comprehensive agreement, which sets forth general terms and conditions of the public-private venture, with a prospective developer, and (b) confirmed that its review of this Agreement did not identify significant concerns requiring changes at this time, while noting certain assumptions and understandings to be addressed in the final comprehensive agreement or related documents. Negotiation of a comprehensive agreement and other related PPTA activities are being undertaken concurrently with the ongoing Environmental Review Process, although the Environmental Review Process will be complete prior to any final design or construction taking place for the Project.
- 1.18 While the parties anticipate that an application for credit assistance under TIFIA may be filed before completion of the Environmental Review Process, the Department will not determine what, if anything, will be constructed until the Environmental Review Process is complete, and the Department may not authorize Fluor to commence final design and construction of the Project until after the completion of the Environmental Review Process.
- 1.19 Financing sufficient to construct the Project or any Phase thereof has not been obtained as of the date of execution of this Agreement. If at the conclusion of the Environmental Review Process the Project or any part thereof is consistent with the alternative selected and the Department chooses to undertake improvements that include the Project or any part thereof, it is anticipated that the Project may be constructed in several Phases with Notice to Proceed for each such Phase contingent upon securing Regulatory Approvals and full financing and satisfaction of other conditions precedent as generally described in Article 4 below.

- 1.20 Fluor and Transurban each acknowledges that the CTB has not allocated funding for the Project (other than certain limited amounts related to Phase VIII of the Springfield Interchange) as of the date of this Agreement and that it is the responsibility of Fluor and Transurban to propose to the Department an acceptable plan of finance. Fluor and Transurban have preliminarily identified alternative financial structures that will be evaluated based on more definitive traffic and revenue projections when available.

**NOW, THEREFORE**, in consideration of the covenants contained herein and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the parties hereto agree as follows:

## **ARTICLE 2**

### **DEFINITIONS**

All capitalized terms used in this Agreement but not expressly defined in this Agreement have the respective meanings set forth on Exhibit A attached hereto.

## **ARTICLE 3**

### **ESTABLISHMENT OF PUBLIC-PRIVATE TRANSACTION**

- 3.1 Basic Agreement. All agreements described herein with respect to the final design, construction, finance, tolling, operation and maintenance of the Project, or any Phase thereof, whether under this Agreement or other Project Agreements, are in all events contingent on the Department choosing improvements at the conclusion of the Environmental Review Process that include the Project or such Phase. The parties hereto shall have the right to terminate this Agreement, as set forth in Section 9.3, if the Project is not consistent with the alternative selected in the Environmental Review Process.

- 3.1.1 The Department, Fluor and Transurban agree that, subject to the Environmental Review Process, the Project as described on Exhibit B attached hereto, and as more particularly identified in the Project scope documents that will be attached to any Design-Build Contract, shall be developed, designed, permitted, financed, acquired, constructed, operated, maintained, equipped and insured in a transaction involving, together, a series of agreements setting forth distinct roles and responsibilities of the Department, Fluor and Transurban, as well as other parties referred to in Section 3.2.1. The Scope of Work for each Phase of the Project will be negotiated upon completion of the Environmental Review Process, and

contemporaneously with the development of the Plan of Finance for each Phase of the Project.

- 3.1.2 This Article 3 identifies and establishes the basic roles and responsibilities of such participants and is not intended, and shall not be construed, to impose any obligations on any party, or provide any party with any rights, that are in addition to any rights or obligations set forth elsewhere in this Agreement and in the other Project Agreements in connection with the subject matter hereof and thereof.

### 3.2 Parties to the Transaction; Roles and Responsibilities.

- 3.2.1 The parties to this Agreement are the Department, Fluor and Transurban. If the Project or any part thereof is consistent with the alternative selected through the Environmental Review Process and the Department chooses to undertake improvements that include the Project or any part thereof, the parties to other Project Agreements will include, among others: Fluor under any Design-Build Contract; Fluor Corporation, a Delaware corporation, as Contractor Guarantor of Fluor's obligations under any Design-Build Contract (the "Contractor Guarantor"); Transurban Limited as guarantor of Transurban's performance of its obligations hereunder in accordance with Section 3.3.1; Transurban or an Affiliate of Transurban or of the Investment Guarantor (as defined below) under any Tolling and Customer Service Agreement and/or any long-term concession agreement; Transurban Holdings Limited, an Australian corporation, as Investment Guarantor of Transurban's investment obligations under Sections 4.1.3.1 or 4.1.3.2, as applicable (the "Investment Guarantor"); Transurban Infrastructure Management Limited, an Australian corporation, as trustee of Transurban Holding Trust, a trust which is a registered managed investment scheme under Chapter 5C of the Corporations Act 2001 of Australian law ("THT"), as provider of a loan, capital contribution or other advance to the Investment Guarantor, or an Affiliate thereof, as necessary to fund such investment obligations if Investment Guarantor otherwise fails to do so; and a guarantor or provider of surety, a letter of credit or other assurance of performance acceptable to the Department with respect to certain obligations of Transurban in accordance with Sections 3.2.5.2(b) and 13.1.1(b), as applicable; as well as such other private sector entities agreed to by Fluor and Transurban as are acceptable to the Department as parties to other Project Agreements and Project Financing Agreements, including any Issuer and parties to any Asset Management agreements.
- 3.2.2 If the Project is determined by the Department in its reasonable discretion to be consistent with the alternative selected through the Environmental Review Process, the Department shall:

- 3.2.2.1 establish, pursuant to the Project Agreements, the terms and conditions under which the Project shall be implemented;
- 3.2.2.2 grant to Fluor and Transurban the right to develop and arrange financing, and the Department intends to work to assist in such undertaking, for either a tax-exempt or long-term concession structure, and to maintain and operate the Project, on the terms and conditions set forth in this Agreement and the other Project Agreements;
- 3.2.2.3 grant to Fluor the right to negotiate a Design-Build Contract for the final design and construction of the initial Phase of the Project and any subsequent Phases in accordance with this Agreement;
- 3.2.2.4 grant to Transurban and/or such other parties selected by Fluor and Transurban and acceptable to the Department (such acceptance not to be unreasonably withheld) the right to negotiate Tolling and Customer Service Agreements, Asset Management agreements or, if a long-term concession structure is approved by the Department upon completion of more definitive revenue projections, a long-term concession agreement, in any case providing for, without limitation, operation, Maintenance and Asset Management of the Project, including the roadway, the electronic toll collection system, and the violation enforcement system for any applicable Phase of the Project, for a term not to exceed the term of this Agreement;
- 3.2.2.5 grant to Transurban the right and obligation to make certain investments in the Project as contemplated by this Agreement and the Plan of Finance;
- 3.2.2.6 grant to Transurban or an Affiliate of Transurban, an Issuer or such other Person as shall be identified in a Plan of Finance the right to set and collect tolls in accordance with this Agreement as amended and restated pursuant to Section 13.17;
- 3.2.2.7 provide any public sector State funds to the Project as specified in this Agreement, any Project Financing Agreements (hereinafter defined) and any Design-Build Contract;
- 3.2.2.8 acquire title to, and as necessary and appropriate, condemn, all Project Right of Way, as provided in any Design-Build Contract;
- 3.2.2.9 provide review services as provided in any Design-Build Contract;



- 3.2.2.10 take acceptance of the Work upon completion thereof, in accordance with, and as shall be provided in, any Design-Build Contract; and
  - 3.2.2.11 undertake any such tasks related to the Project as may be provided for under this Agreement and any other Project Agreement.
- 3.2.3 If the Project is determined by the Department in its reasonable discretion to be consistent with the alternative selected through the Environmental Review Process, Fluor shall:
- 3.2.3.1 have the right and obligation to obtain all Regulatory Approvals (other than Department Regulatory Approvals) for, perform Project Right of Way acquisition and Utility Relocation services for, and design and construct the Project and perform such work in accordance with the terms and conditions of any Design-Build Contract and any other Project Agreement and NEPA environmental approvals;
  - 3.2.3.2 jointly with Transurban have the right and obligation to use commercially reasonable efforts to develop and arrange financing, and the Department intends to work to assist in such undertaking, for all of the Phases of the Project, as specified in this Agreement and any Project Financing Agreements, including using commercially reasonable efforts to obtain Federal funds, including without limitation TIFIA credit assistance, to be applied to finance each Phase of the Project in accordance with Article 4 and exploring the financial implications of utilizing Federally tax-exempt bond financing, secured by a pledge of net Project revenues (after provision for payment of the expenses of operation, Maintenance and Asset Management of the Project, including the roadway, the electronic toll collection system and the violation enforcement system), or a long-term concession structure (under which Transurban, or its permitted assigns, as concessionaire, is responsible for the expense of operation, Maintenance and Asset management of the Project, including the roadway, the electronic toll collection system, and the violation enforcement system) and related taxable debt and/or equity financing;
  - 3.2.3.3 cause the Work to be insured, as and when provided in any Design-Build Contract;
  - 3.2.3.4 provide payment, and performance bonds, as and when provided in any Design-Build Contract;
  - 3.2.3.5 cause the Contractor Guarantor to execute and deliver a Completion Guaranty to guaranty performance and completion

of Fluor's obligations under any Design-Build Contract which Completion Guaranty (a) in the case of a financing structure other than a long-term concession structure, is substantially in the form of Exhibit C-1 attached hereto, or (b) in the case of a long-term concession structure, is in a form containing substantially similar terms to those in Exhibit C-1 in favor of the concessionaire, which form is acceptable to the Department in its reasonable discretion;

3.2.3.6 provide a fixed price for portions of the work to the extent such work is the subject of Notice(s) to Proceed issued within certain time frames as provided in any Design-Build Contract;

3.2.3.7 perform all the applicable duties and obligations of an operator or private entity under the PPTA, including the duties set forth in Section 56-565 of the PPTA, for each Phase until the Transition Date for such Phase, at which time Transurban or an Affiliate of Transurban, an Issuer or such other Person as shall be identified in a Plan of Finance shall assume such role, as shall be provided in this Agreement as amended and restated pursuant to Section 13.17 and in a Plan of Finance agreed to by the Department; and

3.2.3.8 subject to applicable Laws, Regulations and Ordinances and other requirements, including without limitation permitting requirements set forth in this Agreement and any Design-Build Agreement, the right to construct the Project across any canal or navigable water course so long as the crossing does not unreasonably interfere with then current navigation and use of the waterway.

3.2.4 If the Project is determined by the Department in its reasonable discretion to be consistent with the alternative selected through the Environmental Review Process, the Contractor Guarantor shall guarantee to the Department the performance and completion of all Fluor's obligations under any Design-Build Contract and any Project Financing Agreements to which Fluor is a party (including, but not limited to, Fluor's warranty and indemnification obligations), in accordance with the provisions of the Completion Guaranty.

3.2.5 If the Project is determined by the Department in its reasonable discretion to be consistent with the alternative selected through the Environmental Review Process, Transurban shall:

3.2.5.1 jointly with Fluor have the right and obligation to use commercially reasonable efforts to develop and arrange financing, and the Department intends to work to assist in such

undertaking, for all Phases of the Project, as specified in this Agreement and any Project Financing Agreements, including (a) using commercially reasonable efforts to obtain Federal funds, including without limitation TIFIA credit assistance, to be applied to finance each Phase of the Project in accordance with Article 4, and (b) exploring the financial implications of utilizing (i) Federally tax-exempt bond financing, secured by a pledge of net Project revenues (after provision for payment of the expenses of operation, Maintenance and Asset Management of the Project, including the roadway, the electronic toll collection system, and the violation enforcement system), including the investment described in Section 4.1.3.1, or (ii) a long-term concession structure (under which Transurban, or its permitted assigns, as concessionaire, is responsible for the expenses of operation, Maintenance and Asset Management of the Project, including the roadway, the electronic toll collection system and the violation enforcement system) and related taxable and equity financing for the Project, including the investment described in Section 4.1.3.2; and

- 3.2.5.2 have (a) the right to negotiate and enter into (i) Tolling and Customer Service Agreements and the right and obligation to use commercially reasonable efforts to arrange Asset Management agreements with third parties acceptable to the Department (such acceptance not to be unreasonably withheld), provided that if a Federally tax-exempt financing structure is selected for the Project, any Tolling and Customer Service Agreement and any Asset Management agreement shall be a qualified management contract for Federal income tax purposes, or (ii) a long-term concession agreement with respect to the Project, with a term not to exceed the term of this Agreement, as applicable, with the Department; *provided, however,* that under either (i) or (ii) of this Section 3.2.5.2(a) such agreements shall provide for operation, Maintenance and Asset Management of the Project, including the roadway, the electronic toll collection system, and the violation enforcement system, which collection and the enforcement systems shall be interoperable with the Department's electronic toll collection utilized on other State toll facilities and the E-Z Pass Regional Electronic Toll Collection System, and (b) the obligation to provide a guaranty, surety bond, letter of credit issued by a United States bank or United States branch of a foreign bank or other assurance of performance, which shall be acceptable to the Department, with respect to the obligations to operate and maintain the Project under the applicable documents described in Section 3.2.5.2(a);

- 3.2.5.3 cause the Investment Guarantor to execute and deliver a Guaranty of Investment Obligations to guarantee performance of Transurban's obligations under Section 4.1.3.1 or 4.1.3.2, as applicable, which Guaranty of Investment Obligations shall be substantially in the form of Exhibit C-3 attached hereto, and cause the trustee of THT to execute and deliver an Investment Funding Commitment to provide amounts to the Investment Guarantor as necessary to fund such investment obligations if the Investment Guarantor otherwise fails to do so, which Investment Funding Commitment shall be substantially in the form of Exhibit C-4 attached hereto; and
- 3.2.5.4 have the right and obligation, if and to the extent provided in this Agreement (as amended and restated pursuant to Section 13.17) and in a Plan of Finance agreed to by the Department, to perform all of the applicable duties and obligations of an operator or private entity under the PPTA, including the duties set forth in Section 56-565 of the PPTA, on and after the Transition Date.
- 3.3 Project Agreements. Certain of the Project Agreements and their content are briefly described below. This Agreement, as amended and restated pursuant to Section 13.17, and any other Project Agreements in effect at the time are to be read and construed together, and together will constitute the "comprehensive agreement" for purposes of the PPTA (notwithstanding that this Agreement is entitled "Comprehensive Agreement").
- 3.3.1 This Agreement and Transurban Performance Guaranty. The Department, Fluor and Transurban are entering into this Agreement to establish the general structure and arrangements for implementing the Project and to establish certain rights and responsibilities of the Parties respecting the Project. Concurrently with the execution of this Agreement, Transurban Limited shall execute and deliver a Transurban Guaranty of Performance to guarantee performance by Transurban of its obligations hereunder, which Transurban Guaranty of Performance shall be substantially in the form of Exhibit C-2 attached hereto.
- 3.3.2 Design-Build Contract. If the Project is determined by the Department in its reasonable discretion to be consistent with the improvement concepts approved through the Environmental Review Process, Fluor shall negotiate and enter into the Design-Build Contract, containing such terms and conditions as shall be mutually agreeable, pursuant to which the Fluor shall have, among other things, the right and obligation to complete the design and construction of the Project, and any Phases thereof upon execution of each Phase supplement thereto, which shall, without limitation, include provisions for a fixed contract price,

payment schedule and guaranteed completion date with respect to the Project, or the Phase, as applicable.

3.3.3 Completion Guaranty. Concurrently with execution of any Design-Build Contract, Contractor Guarantor shall execute and deliver the Completion Guaranty.

3.3.4 Guaranty of Investment Obligations and Related Funding. Concurrently with the delivery of the Completion Guaranty, the Investment Guarantor shall execute and deliver the Guaranty of Investment Obligations and the trustee of THT shall execute and deliver the Investment Funding Commitment Letter.

3.3.5 Project Financing Agreements. Prior to the initial Financial Closing Date with respect to the initial Phase, Fluor, Transurban and the Department shall have mutually agreed to a Project Financing Agreement which shall, without limitation, include a Plan of Finance with respect to the initial Phase that provides funds as and when needed to pay all amounts payable under the related Design-Build Contract for such Phase.

3.3.6 Operations Agreements. Prior to the initial Financial Closing Date with respect to the initial Phase, Transurban or an Affiliate of Transurban or of the Investment Guarantor, as applicable, shall have (a) (i) negotiated and executed any Tolling and Customer Service Agreement, and a party or parties selected by Transurban and acceptable to the Department (with such acceptance not to be unreasonably withheld) shall have negotiated and executed any Asset Management agreement, as applicable, or (ii) Transurban shall have negotiated and executed a long-term concession agreement with respect to the Project, or the applicable Phases thereof; *provided, however*, that under either (i) or (ii) of this Section 3.3.6(a) Transurban or an Affiliate of Transurban or of the Investment Guarantor, as applicable, and/or such other parties selected by Transurban and acceptable to the Department (with such acceptance not to be unreasonably withheld) shall have, among other things, the right and obligation to provide for operation, Maintenance and Asset Management of the Project, or Phases thereof, as applicable, including the roadway, the electronic toll collection system, and the violation enforcement system, and (b) provided a guaranty, surety bond, a letter of credit issued by a United States bank or United States branch of a foreign bank or other assurance of performance, which shall be acceptable to the Department, with respect to the obligations to operate and maintain the Project under the applicable documents described in Section 3.3.6(a).

3.4 Conditions Precedent to Work. Fluor shall not have the right or the obligation to commence work on the Project or any Phase of the Project until the applicable

conditions precedent to the Notice to Proceed with respect to the Project, or applicable Phase, as set forth in Article 4, are satisfied or waived by the Department in writing.

- 3.5 Nature of Parties' Interests Under Certain Project Agreements. The Department, Fluor and Transurban intend and agree that, subject to the terms and conditions of any Project Financing Agreement and to the rights and property interests of Transurban under this Agreement or any other Project Agreement:

- 3.5.1 if a taxable concession financing structure is selected, neither Fluor nor Transurban shall have a fee title, leasehold estate, easement or other real property interest of any kind in or to the Project or the Project Right of Way by virtue of this Agreement, any of the other Project Agreements or otherwise; and
- 3.5.2 the Department will be the sole owner of fee simple title to the Project and the Project Right of Way and all improvements constructed, and all tangible personal property installed, with full power and authority to possess, control and utilize the Project and Project Right of Way.

## **ARTICLE 4**

### **FINANCING OF PROJECT AND CONDITIONS PRECEDENT**

- 4.1 Plan(s) of Finance.

- 4.1.1 The Department, Fluor and Transurban recognize that as of the Agreement Date, sufficient funding to construct the Project or any Phase thereof has not been obtained and, as a result, the rights and obligations of any Fluor Party and/or any Transurban Party to design, construct, operate and maintain, as applicable, the Project or any Phase thereof are contingent on, among other things, the development by Fluor and Transurban of a Plan of Finance for the Project or such Phase, as applicable, acceptable to the Department and to the United States Department of Transportation, as applicable, that provides reasonable assurances that such funding will be available to pay the costs of design and construction and expenses of operation, Maintenance and Asset Management of the Project or Phase, as applicable, including the roadway, the electronic toll collection system, and the violation enforcement system in a timely manner. After the Agreement Date, contingent on development of an acceptable, applicable Plan of Finance, the parties hereto will work together to prepare definitive Project Financing Agreements for the Project or any Phase thereof. The definitive Project Financing Agreements shall address all sources of funds and must provide that sufficient funds will be available at the times expected to be needed to pay or reimburse (a) the contract price in accordance with the terms (including any price escalation provisions) of

the Design-Build Contract, which may include without limitation any contingencies for risks retained by the Department under any Design-Build Contract, (b) expenses incurred by the Department, Fluor and Transurban all as provided for in the applicable Plan of Finance, and (c) costs of issuance with respect to any bonded debt or equity (including without limitation fees of underwriters, financial advisors and counsel).

- 4.1.2 The Plan of Finance shall make provision for (a) compensation for Project development expenses incurred by Fluor and Transurban after August 25, 2004, and prior to the initial Financial Closing Date, including without limitation the costs of the Investment Grade Traffic and Revenue Study, which shall be commissioned and paid for by Fluor and/or Transurban, and preliminary engineering and development expenses (incurred by Fluor or Transurban employees or third parties by contract with Fluor or Transurban), but excluding expenses for business development not related to the Project and for any lobbying, *provided* that any such Project development expenses for which compensation is provided in the Plan of Finance must, in the Department's reasonable discretion, be audited and reasonable, and (b) reimbursement of Department employee and legal, financial or other advisors time and expenses allocable to the Project and negotiation of Project Agreements. Subject to Section 9.2.1.2, the source of compensation for any Project development expenses described in (a) of this Section 4.1.2 in excess of costs related to the Investment Grade Traffic and Revenue Study shall not be State or Federal funds. Compensation for any Project development expenses described in (a) of this Section 4.1.2 shall be payable as follows: an amount, equal to the sum of (i) such expenses, plus (ii) an amount equal to 100% of the total of such expenses, shall be paid to Fluor and/or Transurban, as applicable, upon the initial Financial Closing Date; *provided, however*, that the aggregate amount payable under clause (ii) of this sentence shall not exceed \$10,000,000. Reimbursement for any Department incurred time and expenses described in (b) of this Section 4.1.2 shall be payable to, or as directed by, the Department upon the initial Financial Closing Date. Fluor and Transurban hereby agree that in the event of a termination for public convenience the Department shall have no liability for the payment of any such Project development expenses except as may be provided in Section 9.2.1.2 and Section 9.9.1, as applicable.
- 4.1.3 Neither the Department, a Fluor Party or an Affiliate thereof, nor a Transurban Party (excluding Transurban Infrastructure Management Limited as trustee of THT which shall have no liability whatsoever pursuant to this clause) shall have any liability to make an investment in or advance funds to the Project or any Phase in the event that funds are not made available for the Project or such Phase, as applicable, except for the liability of Fluor or Transurban, as the case may be, to pay for the costs of the Investment Grade Traffic and Revenue Study (subject to Section

9.2.1.2) and otherwise as may be provided in the Project Agreements executed by any such party, *provided* that

4.1.3.1 if a Federally tax-exempt financing structure is selected for the Project and a Tolling and Customer Service Agreement has been entered into by Transurban or an Affiliate of Transurban or of the Investment Guarantor, as applicable, Transurban (or in the event of Transurban's failure to do so, the Investment Guarantor or an Affiliate thereof), shall have the right and obligation to make an investment of at least 15% of the total funds required for the Project, on the terms and subject to the conditions set forth in the Plan of Finance and in Project Financing Agreements, in each case acceptable in form and substance to the Department, Fluor and Transurban, which shall be evidenced by a subordinated debt instrument in a principal amount equal to such investment bearing interest at a rate estimated at 600-700 basis points above the rate of interest achieved for the Project senior debt (such subordinated debt interest rate estimated to be 12-13% in the interest rate environment in existence during the first calendar quarter of 2005); and

4.1.3.2 if a taxable concession financing structure is selected for the Project, and a concession agreement has been entered into by Transurban or an Affiliate of Transurban or of the Investment Guarantor, as applicable, Transurban (or in the event of Transurban's failure to do so, the Investment Guarantor or an Affiliate thereof), shall have the right and obligation to make an equity investment relative to such concession of at least 15% of the total funds required for the Project on the terms and subject to the conditions set forth in the applicable Plan of Finance and in applicable Project Financing Agreements, in each case acceptable in form and substance to the Department, Fluor and Transurban.

4.1.4 It is anticipated that the Project will be financed, in part, through the issuance of debt instruments by an Issuer or through the arrangement of taxable debt and equity if a long-term concession structure is approved by the Department in the Project Financing Agreements. Such bonds, debt or equity will be secured by, among other things, net revenues derived from the Project after payment of the expenses of operation, Maintenance and Asset Management of the Project, including the roadway, the electronic toll collection system and the violation enforcement system, but not by the faith and credit of the Commonwealth of Virginia, the CTB or the Department. The right to impose tolls on the Project and receive revenues therefrom, together with certain other rights under this Agreement, may be collaterally assigned as security for such bonds, debt or equity in



accordance with Project Financing Agreements acceptable to the Department.

- 4.1.5 The parties hereto agree that the manner of accommodation of a High-Occupancy Requirement will be dependent on the results of the Investment Grade Traffic and Revenue Study and development of the Plan of Finance. Final details of the manner of such accommodation shall be set forth in this Agreement as amended and restated in accordance with Section 13.17 and the Project Financing Agreements, subject to Department approval and the enactment of any required enabling legislation.
- 4.1.6 Fluor and Transurban agree to cooperate with peer review by the Department of the Investment Grade Traffic and Revenue Study. The Department agrees that such peer review will be of a limited scope and will not result in the generation of a separate traffic and revenue study.
- 4.1.7 In the event that a Federally tax-exempt financing structure is selected and the Issuer is a nonprofit corporation such as described in Revenue Ruling 63-20, then Fluor and Transurban shall have the right to designate the underwriter for tax-exempt bonds issued by the Issuer for the Project.
- 4.2 Milestones. The Department, Fluor and Transurban shall cooperate to achieve the following milestones (“Milestones” and each a “Milestone”) by the dates set forth below, *provided* that failure to achieve a Milestone shall not constitute a Fluor Default, a Transurban Default or a Department Default, as applicable, hereunder or give rise to the right to exercise any rights and/or remedies at law or in equity, except as provided in Section 9.5:
  - 4.2.1 Initial Phase Milestones.
    - (a) Delivery to the Department of an Investment Grade Traffic and Revenue Study by October 28, 2005.
    - (b) Issuance of the NEPA Record of Decision (the “ROD”), which is the conclusion of the Environmental Review Process, by March 1, 2006.
    - (c) If the Project is determined by the Department in its reasonable discretion to be inconsistent with the alternative selected through the Environmental Review Process two options shall be available: (i) the Department, Fluor, or Transurban may terminate this Agreement pursuant to Section 9.3.1; or (ii) the Department, Fluor, and Transurban may agree, in writing, not to terminate this Agreement pursuant to Section 9.3.1 (subject to Section 4.2.1(c)(ii)(C)), and the parties shall cooperate to achieve the following Milestones:

- (A) by a date within 3 months after issuance of the ROD, attempt to revise the Project in a manner acceptable to the Department, Fluor and Transurban so that the revised Project is, in Department's reasonable discretion, consistent with the selected alternative;
  - (B) by a date within 9 months after issuance of the ROD, complete any additional environmental or FHWA review needed to evaluate the revised Project or other alternatives; and
  - (C) by a date within 12 months after issuance of the ROD, the Department shall determine in its reasonable discretion (x) the revised Project is consistent with the alternative selected as a result of the original Environmental Review Process or any such additional environmental review, or (y) the revised Project is inconsistent with the alternative selected as a result of the original Environmental Review Process or any alternative selected as a result of any such additional environmental review or other review required by FHWA, in which case the Department, Fluor, or Transurban may terminate the Project pursuant to Section 9.3.1.
- (d) If the Project is determined by the Department in its reasonable discretion to be consistent with the alternative selected through the original Environmental Review Process, or any such additional environmental or FHWA review, the Department, Fluor and Transurban shall cooperate to achieve the following milestones:
- (i) by a date which is 6 months after issuance of the ROD or a determination pursuant to Section 4.2.1(c)(ii)(C)(x), as applicable, identification of the initial Phase to be financed;
  - (ii) by a date which is 12 months after issuance of the ROD or a determination pursuant to Section 4.2.1(c)(ii)(C)(x), as applicable, (A) completion of negotiations regarding a Design-Build Contract, including a contract price, payment schedule and guaranteed completion date for the initial Phase of the Project, (B) completion of negotiations regarding any Tolling and Customer Service Agreements or long-term concession agreement, as applicable, and a related assurance of performance acceptable to the Department in accordance with Sections 3.2.5.2(b) and 3.3.6(b), (C) completion of negotiations regarding an amendment and restatement of this Agreement as contemplated by Section 13.17, (D) acceptance by

Department, and as applicable the United States Department of Transportation, of the Plan of Finance for the initial Phase of the Project, including a finding by the Commissioner or his designee that any funds identified in such Plan of Finance that are subject to appropriation by the General Assembly and allocation by the CTB are legally available at the time or are reasonably expected to be legally available the time required by the applicable Design-Build Contract payment schedule, and (E) TPB Approval with respect to the Project shall have been obtained; and

- (iii) by a date which is 15 months after issuance of the ROD or a determination pursuant to Section 4.2.1(c)(ii)(C)(x), as applicable, (A) the Financial Closing Date shall have occurred, and (B) satisfaction of all other conditions precedent to the issuance of the Notice to Proceed as set forth in Section 4.3.

- 4.2.2 Additional Phase Milestones. The parties shall have agreed to Milestones for any additional Phases of the Project similar to those set forth in Section 4.2.1 and a methodology for establishing Milestones for further Phases by a date which is 15 months after issuance of the ROD or a determination pursuant to Section 4.2.1(c)(ii)(C)(x), as applicable.
- 4.2.3 Amendment of Milestones. The parties may agree to extend or otherwise amend any Milestone at any time by mutual agreement in writing. Any decision not to extend or otherwise amend any Milestone shall be final and shall not be subject to challenge unless it is determined that such decision was arbitrary and capricious.
- 4.3 Conditions Precedent to Design-Build Notice(s) to Proceed. The Department shall not issue a Notice to Proceed under any Design-Build Contract for any Work on the Project or any Phase and Fluor shall have no obligation to proceed with any such Work unless and until the following conditions have been satisfied or waived by the Department in writing:
  - 4.3.1 The Department shall have determined in its reasonable discretion that sufficient funding is available or reasonably expected to be available, subject to appropriation and allocation, as applicable, as and when needed to pay the cost of such Work, including all costs and expenses to be incurred by the Department, and Project Financing Agreements with respect to the Project or the applicable Phase shall have been duly authorized, executed and delivered by the parties thereto.
  - 4.3.2 Any State or Federal funding for such Work shall have been allocated to the Project or the applicable Phase in the SYIP approved by the CTB and

such SYIP shall be in full force and effect when the Department issues the Notice to Proceed for such Work.

- 4.3.3 The Department, or in the case of a long-term concession the concessionaire, and Fluor shall have agreed to the contract price for Work on the Project or the applicable Phase, a payment schedule, a substantial completion date and a final completion date, which shall have been incorporated in any Design-Build Contract, or any applicable change order thereto, and with respect to such Work there shall have been executed and delivered by the Contractor Guarantor a Completion Guaranty (a) in the case of a financing structure other than a long-term concession agreement, substantially in the form of Exhibit C-1 hereto, or (b) in the case of a long-term concession financing structure, in a form containing substantially similar terms to those in Exhibit C-1 in favor of the concessionaire, which form is acceptable to the Department in its reasonable discretion.
- 4.3.4 All Regulatory Approvals (including Department Regulatory Approvals) required to commence the Work shall have been acquired, including, without limitation, all approvals required by or in connection with the STIP, TIP or CLRP.
- 4.3.5 All other conditions precedent set forth in any Design-Build Contract and any amendment or change order with respect thereto applicable to the Project or the applicable Phase shall have been satisfied or waived by the Department in writing.
- 4.3.6 The proposed design, construction, financing, and operation of the Project or the applicable Phase shall be consistent with all requirements of the PPTA.
- 4.3.7 Any applicable FHWA approvals or agreements required for any Work to be performed pursuant to such Notice to Proceed shall have been obtained.

## ARTICLE 5

### DESIGN, ACQUISITION AND CONSTRUCTION OBLIGATIONS; DEPARTMENT OVERSIGHT

#### 5.1 Fluor Obligations to Design, Acquire and Construct.

- 5.1.1 If the Project is determined by the Department in its reasonable discretion to be consistent with the alternative selected through the Environmental Review Process, Fluor shall enter into a Design-Build Contract under which Fluor shall design, construct, insure, permit, acquire properties and relocate utilities, all in accordance with the terms and conditions of such Design-Build Contract.
- 5.1.2 Fluor shall not commence Work on the Project or any applicable Phase until a Completion Guaranty has been executed and delivered and all other applicable conditions precedent as set forth in any Design-Build Contract and this Agreement have been satisfied or waived in writing and the Department has issued a Notice to Proceed with respect thereto.

#### 5.2 Fluor Draws.

- 5.2.1 Fluor shall have the right to submit draw requests for payment for Work or Work Product, all solely as shall be provided for in any Design-Build Contract.
- 5.2.2 No draws for amounts payable pursuant to any Design-Build Contract shall be permitted or valid unless and until any written approval and authorization of the draw request required by the Design-Build Contract has been issued in the form provided in the Design-Build Contract, appropriately completed. Such review and approval shall occur within the time periods required by any Design-Build Contract.
- 5.2.3 The amount of compensation to Fluor provided for in the Project Financing Agreements shall be paid to Fluor as, when and from the sources specified therein.

#### 5.3 Department Right to Oversee Work.

The Department shall have the right at all times during the Term of this Agreement and any other Project Agreements to oversee the performance of Fluor and/or Transurban under this Agreement and the other Project Agreements to which Fluor and/or Transurban is a Party.

## ARTICLE 6

### CONTRACTING PRACTICES

- 6.1 Contracting Practices. Except for (a) this Agreement; (b) the other Project Agreements; and (c) the contracts, subcontracts and agreements expressly permitted under this Agreement or the other Project Agreements (including, but not limited to, subcontracts Fluor enters into to carry out the Work under any Design-Build Contract) or authorized or directed by the Department, Fluor and Transurban shall have no right or authority to enter into, deliver or perform any contracts or agreements pertaining to the Project which purport to bind the State or the Department or which are contrary to the terms and conditions of the Project Agreements, without the express prior written consent of the Department, which consent may be granted or withheld in the sole and absolute discretion of the Department.
- 6.2 Obligation to Refrain from Discrimination.
- 6.2.1 Fluor and Transurban each covenant and agree that it shall not discriminate, and it shall require all of its subcontractors not to discriminate, against any person, or group of persons, on account of age, sex, marital status, race, creed, color, national origin, religion or the presence of any sensory, mental or physical handicap, in connection with the Project, nor shall Fluor or Transurban establish or permit any such practice or practices of discrimination or segregation with reference to the selection, use, hiring, firing, promotion or termination of employees, contractors, subcontractors and vendors or with reference to the use, occupancy or enjoyment of or access to or toll rates charged for use of the Project under like conditions; *provided, however*, that the prohibition against discrimination on the basis of sensory, mental or physical handicap shall not apply if the particular disability prevents the proper performance of the particular person involved.
- 6.2.2 Fluor and Transurban each shall conduct its activities in connection with the Project in compliance with all other requirements imposed pursuant to (a) the Fair Employment Contracting Act, Section 2.2-4200, *et seq.* of the Code of Virginia, as amended; (b) Titles VI and VII of the Civil Rights Act of 1964, as amended; (c) Section 504 of the Rehabilitation Act of 1973, as amended; (d) the Americans with Disabilities Act of 1990; (e) 49 C.F.R. Part 26, as amended; and (f) all other applicable rules and regulations, as amended.
- 6.2.3 Notwithstanding this Section 6.2 or any other provision of the Project Agreements, the parties hereto understand and agree that toll rates with respect to the Project are anticipated to be variable and may take into consideration type, weight and occupancy of vehicle, use of vehicle for

police and emergency services, number of axles, time of travel, traffic congestion and other traffic conditions, and the type of facilities provided.

- 6.3 Federal Requirements. Any Design-Build Contract, Tolling and Customer Service Agreement or long-term concession agreement, as applicable, shall include agreements by Fluor and Transurban, as applicable, to comply with all requirements under applicable Federal laws and regulations (including without limitation the Value Pricing Agreement requirements), except any that are waived in writing by the applicable Federal entity.

## ARTICLE 7

### INDEMNIFICATION AND INSURANCE

- 7.1 Fluor Indemnities. Fluor shall indemnify, protect, defend, hold harmless and release each State Indemnitee to the extent provided in this Section 7.1. Such indemnity under this Agreement shall survive the expiration or earlier termination of this Agreement or the other Project Agreements to which Fluor is a party and shall continue for 10 years following (a) final acceptance by the Department of the Project in accordance with the Design-Build Contract or (b) earlier termination of this Agreement; *provided, however*, that such 10 year limitation on survival shall not apply in the event of fraud or a material misrepresentation with respect to a particular covenant, agreement, representation or warranty, and *provided further* that additional indemnification agreements shall be as provided in any Design-Build Contract and any other Project Agreement. Notwithstanding the foregoing, Fluor's indemnification of any State Indemnitee shall be limited solely to its obligations under this Agreement and other Project Agreements to which Fluor becomes a party. For the avoidance of doubt, the indemnity obligations of Fluor under this Section 7.1 are several and separate from any indemnity obligations of Transurban under Section 7.2 below.
- 7.1.1 Except as otherwise expressly provided below, Fluor shall indemnify, protect, defend, hold harmless and release each State Indemnitee from and against any and all losses, damages, costs and expenses, including reasonable attorneys' fees, from third party Claims arising out of the following:
- 7.1.1.1 any error or negligent or intentionally wrongful act or omission of any Fluor Party in connection with, relating to or otherwise arising out of Fluor's performance under this Agreement, provided that the indemnity under this Section 7.1.1.1 shall be limited to such Claims arising out of death, bodily injury or property damage suffered by third parties;

- 7.1.1.2 any violation by any Fluor Party of Laws, Regulations and Ordinances in connection with, relating to or otherwise arising out of Fluor's performance under this Agreement;
  - 7.1.1.3 infringement by any Fluor Party (excluding third party equipment and software vendors providing commercially available equipment or software, *provided* that Fluor selects such vendors with commercially reasonable care and obtains commercially reasonable licenses and patent indemnification from such vendors that expressly benefit the Department and Transurban, and *provided further* that such equipment or software has not been modified for use with respect to the Project) of any actually or allegedly patented, copyrighted, trademarked, service-marked or other proprietary materials, equipment, devices or processes (except with respect to any particular design process or the product of a particular manufacturer or manufacturers specified or required by the Department); and
  - 7.1.1.4 fraud or intentional misrepresentation by any Fluor Party.
- 7.1.2 To the fullest extent permitted by law, Fluor's indemnities exclude any portion of liability on a Claim that is attributable to the negligent acts or omissions of a State Indemnitee or to any failure by the Department, its agents or employees, the CTB or the Commissioner to comply with NEPA or the PPTA. If the negligent acts or omissions of a State Indemnitee has contributed to a loss (in whole or in part), Fluor shall not be obligated to indemnify State Indemnites for the proportionate share of such Claim caused thereby. In no event, however, shall any Fluor Party's indemnities include the portion of liability on any Claim for which Transurban is responsible under Section 7.2.
- 7.1.3 For purposes of this Section 7.1, a "third party" means any Person other than a State Indemnitee, a Transurban Party or a Fluor Party, except that a third party includes any State employee, agent and contractor or his or her heir or representative who asserts a Claim arising out of death, bodily injury or property damage against a State Indemnitee or a Fluor Party and which is not covered by State's worker's compensation program.
- 7.2 Transurban Indemnities. Transurban shall indemnify, protect, defend, hold harmless and release each State Indemnitee to the extent provided in this Section 7.2. Such indemnity shall survive the expiration or earlier termination of this Agreement or the other Project Agreements to which Transurban is a party and shall continue for 10 years following (a) the end of the term of the Tolling and Customer Service Agreement or the long-term concession agreement, as applicable, or (b) earlier termination of this Agreement; *provided, however*, that such 10 year limitation on survival shall not apply in the event of fraud or a



material misrepresentation with respect to a particular covenant, agreement, representation or warranty, and *provided* that additional indemnification agreements shall be provided in any Tolling and Customer Service Agreement, any Asset Management agreement, or long-term concession agreement, as applicable. Notwithstanding the foregoing, Transurban's indemnification of any State Indemnitee shall be limited solely to its obligations under this Agreement and other Project Agreements to which Transurban becomes a party. For the avoidance of doubt, the indemnity obligations of Transurban under this Section 7.2 are several and separate from any indemnity obligations of Fluor under Section 7.1 above.

7.2.1 Except as otherwise expressly provided below, Transurban shall indemnify, protect, defend, hold harmless and release each State Indemnitee from and against any and all losses, damages, costs and expenses, including reasonable attorneys' fees, from third party Claims arising out of the following:

7.2.1.1 any error or negligent or intentionally wrongful act or omission of any Transurban Party in connection with, relating to or otherwise arising out of Transurban's performance under this Agreement, provided that the indemnity under this Section 7.2.1.1 shall be limited to such Claims arising out of death, bodily injury or property damage suffered by third parties;

7.2.1.2 any violation by any Transurban Party of Laws, Regulations and Ordinances in connection with, relating to or otherwise arising out of Transurban's performance under this Agreement;

7.2.1.3 infringement by any Transurban Party (excluding third party equipment and software vendors providing commercially available equipment or software, *provided* that Transurban selects such vendors with commercially reasonable care and obtains commercially reasonable licenses and patent indemnification agreements from such vendors that expressly benefit the Department and Fluor, and *provided further* that such equipment or software has not been modified for use with respect to the Project) of any patented, copyrighted, trademarked, service-marked or other proprietary materials, equipment, devices or processes (except with respect to any particular design process or the product of a particular manufacturer or manufacturers specified or required by the Department); and

7.2.1.4 fraud or intentional misrepresentation by any Transurban Party.

7.2.2 To the fullest extent permitted by law, Transurban's indemnities exclude the portion of liability on a Claim that is attributable to the negligent acts or omissions of a State Indemnitee or to any failure by the Department, its

agents or employees, the CTB or the Commissioner to comply with NEPA or the PPTA. If the negligent acts or omissions of a State Indemnatee has contributed to a loss (in whole or in part), Transurban shall not be obligated to indemnify such State Indemnatee for the proportionate share of such Claim caused thereby. In no event, however, shall any Transurban Party's indemnities include the portion of liability on any Claim for which Fluor is responsible under Section 7.1.

- 7.2.3 For purposes of this Section 7.2, a "third party" means any Person other than a State Indemnatee, a Fluor Party or a Transurban Party, except that a third party includes any State employee, agent and contractor or his or her heir or representative who asserts a Claim arising out of death, bodily injury or property damage against a State Indemnatee or a Transurban Party and which is not covered by State's worker's compensation program.

### 7.3 Defense and Indemnification Procedures.

- 7.3.1 If Department receives notice of or otherwise has actual knowledge of a Claim which it believes is within the scope of Fluor's and/or Transurban's indemnification under Section 7.1 or Section 7.2, as applicable, it shall by writing as soon as practicable (a) inform Fluor and/or Transurban, as applicable (the "Affected Party") of such Claim; (b) send to the Affected Party a copy of all written materials Department has received asserting such Claim and (c) notify the Affected Party that either (i) the defense of such Claim is being tendered to the Affected Party or (ii) Department has elected to conduct its own defense for a reason set forth in Section 7.3.5.
- 7.3.2 If the insurer under any applicable insurance policy accepts tender of defense, the Affected Party and the Department shall cooperate in the defense as required by the insurance policy. If no defense is provided by insurers under potentially applicable insurance policies, then Sections 7.3.3, 7.3.4, 7.3.5 and 7.3.6 shall apply.
- 7.3.3 If the defense is tendered to the Affected Party, it shall within 45 Days of said tender deliver to the Department a written notice stating that the Affected Party (a) accepts the tender of defense and confirms that the Claim is subject to full indemnification hereunder without any "reservation of rights" to deny or disclaim full indemnification thereafter, (b) accepts the tender of defense but with a "reservation of rights" in whole or in part or (c) rejects the tender of defense if it reasonably determines it is not required to indemnify against the Claim under Section 7.1 or Section 7.2, as applicable. If such notice is not delivered within such 45 Days, the tender of defense shall be deemed rejected.
- 7.3.4 If the Affected Party gives notice under Section 7.3.3, such party shall have the right to select legal counsel for the State Indemnitees, subject to

reasonable approval of the State Attorney General, and shall otherwise control the defense of such Claim, including settlement, and bear the fees and costs of defending and settling such Claim. During such defense: (a) the Affected Party shall at its expense, fully and regularly inform Department of the progress of the defense and of any settlement discussions; and (b) Department shall, at the Affected Party's expense for all of Department's reasonable out-of-pocket third party expenses, fully cooperate in said defense, provide to the Affected Party all materials and access to personnel it requests as necessary for defense, preparation and trial and which or who are under the control of or reasonably available to Department and maintain the confidentiality of all communications between it and the Affected Party concerning such defense to the extent allowed by law.

- 7.3.5 The Department shall be entitled to select its own legal counsel and otherwise control the defense of such Claim if: (a) the defense is tendered to the Affected Party and it refuses the tender of defense, or fails to accept such tender within 45 Days, or reserves any right to deny or disclaim such full indemnification thereafter, or (b) the Department, at the time it gives notice of the Claim or at any time thereafter, reasonably determines that (i) a conflict exists between it and the Affected Party which prevents or potentially prevents the Affected Party from presenting a full and effective defense or (ii) the Affected Party is otherwise not providing an effective defense in connection with the Claim and the Affected Party lacks the financial capability to satisfy potential liability or to provide an effective defense. The Department may assume its own defense pursuant to Section 7.3.5(b) by delivering to the Affected Party written notice of such election and the reasons therefore. A refusal of, or failure to accept, a tender of defense may be treated by Department as a Claim against the Affected Party subject to resolution pursuant to Section 10.9.
- 7.3.6 If the Department is entitled and elects to conduct its own defense pursuant hereto, all reasonable costs and expenses it incurs in investigating and defending any Claim for which it is entitled to indemnification hereunder (and any settlements or judgments resulting therefrom) shall be reimbursed by the Affected Party after completion of the proceeding.
- 7.3.7 In the event the Department is entitled to and elects to conduct its own defense, then it shall have the right to settle or compromise the Claim with the Affected Party's prior written consent, which shall not be unreasonably withheld or delayed, or with approval of the court, and with the full benefit of the Affected Party's indemnity. Notwithstanding the foregoing, if the Department elects to conduct its own defense and it is later determined that no indemnification obligation existed as to the particular Claim, the Department shall pay its own costs and expenses relating thereto. In addition, if the Department elects to conduct its own

defense because it perceives a conflict of interest, the Department shall pay its own costs and expenses relating thereto.

- 7.4 Responsibilities Regarding Insurance. Each of Fluor and Transurban shall carry or cause to be carried the insurance policies and satisfy or cause to be satisfied the insurance covenants set forth in any Project Agreement to which it is a party.

## **ARTICLE 8**

### **REPRESENTATIONS, WARRANTIES AND FINDINGS**

- 8.1 Department Representations and Warranties. The Department hereby represents and warrants to each of Fluor and Transurban as follows:

- 8.1.1 The Department is a department of the executive branch of the State and has full power, right and authority to execute, deliver and perform its obligations under, in accordance with and subject to the terms and conditions of this Agreement and the other Project Agreements to which the Department is a party.
- 8.1.2 Each person executing this Agreement or any other Project Agreement, or any other agreement, instrument or document on behalf of the Department to which the Department is a party has been or at such time of execution will be duly authorized to execute each such document on behalf of the Department.
- 8.1.3 Neither the execution and delivery by the Department of this Agreement and the other Project Agreements executed by the Department concurrently herewith, nor the consummation of the transactions contemplated hereby or thereby, is in conflict with or will result in a default under or violation of any other agreements or instruments to which it is a party or by which it is bound.
- 8.1.4 There is no action, suit, proceeding, investigation or litigation pending and served on the Department which challenges the Department's authority to execute, deliver or perform, or the validity or enforceability of, this Agreement and the other Project Agreements to which the Department is a party, or which challenges the authority of the Department official executing this Agreement or the other Project Agreements to which the Department is a party, and the Department has disclosed to Fluor and Transurban any pending and unserved or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which the Department is aware.
- 8.1.5 This Agreement constitutes the legal, valid and binding obligation of the Department, enforceable in accordance with its terms.

8.2 Fluor Representations and Warranties. Fluor hereby represents and warrants to the Department as follows:

- 8.2.1 Fluor is a duly organized corporation created under the laws of the State of California and has the requisite power and all required licenses (or will have all required licenses prior to the time activities which require licenses are undertaken) to carry on its present and proposed activities, and has full power, right and authority to execute, deliver and perform its obligations under, in accordance with and subject to the terms and conditions of this Agreement and the other Project Agreements to which Fluor is a party.
- 8.2.2 Fluor has taken or caused to be taken all requisite action to authorize the execution and delivery of, and the performance of its obligations under, this Agreement and the other Project Agreements to which Fluor is a party.
- 8.2.3 Each person executing this Agreement or any other Project Agreement on behalf of Fluor to which Fluor is a party has been or at such time of execution will be duly authorized to execute each such document on behalf of Fluor.
- 8.2.4 Neither the execution and delivery by Fluor of this Agreement and the other Project Agreements executed by Fluor concurrently herewith, nor the consummation of the transactions contemplated hereby or thereby, is in conflict with or will result in a default under or violation of any other agreements or instruments to which Fluor is a party or by which it is bound.
- 8.2.5 There is no action, suit, proceeding, investigation, indictment or litigation pending and served on Fluor which challenges Fluor's authority to execute, deliver or perform, or the validity or enforceability of, this Agreement and the other Project Agreements to which Fluor is a party, or which challenges the authority of the Fluor official executing this Agreement or the other Project Agreements to which Fluor is a party, and Fluor has disclosed to the Department any pending and unserved or threatened action, suit, proceeding, investigation, indictment or litigation with respect to such matters of which Fluor is aware.
- 8.2.6 Fluor is in material compliance with all Laws, Regulations and Ordinances applicable to Fluor or its activities in connection with this Agreement and the other Project Agreements to which Fluor is a party.
- 8.2.7 This Agreement constitutes the legal, valid and binding obligation of Fluor, enforceable in accordance with its terms.

8.3 Transurban Representations and Warranties. Transurban hereby represents and warrants to the Department as follows:

- 8.3.1 Transurban is a duly organized corporation created under the laws of the State of Delaware, Transurban Limited is a duly organized corporation created under the laws of Australia and the Investment Guarantor is a duly organized corporation created under the laws of Australia and each such entity has the requisite power and all required licenses (or will have all required licenses prior to the time activities which require licenses are undertaken) to carry on its present and proposed activities, and has full power, right and authority to execute, deliver and perform its obligations under, in accordance with and subject to the terms and conditions of this Agreement and the other Project Agreements to which Transurban, the Investment Guarantor or an Affiliate of Transurban or of the Investment Guarantor, as applicable, is a party.
- 8.3.2 Transurban, Transurban Limited and the Investment Guarantor each has taken or caused to be taken all requisite action to authorize the execution and delivery of, and the performance of its obligations under, this Agreement and the other Project Agreements to which Transurban, the Investment Guarantor or an Affiliate of Transurban or of the Investment Guarantor, as applicable, is a party.
- 8.3.3 Each person executing this Agreement or any other Project Agreement on behalf of Transurban, the Investment Guarantor or an Affiliate of Transurban or of the Investment Guarantor, as applicable, to which Transurban, the Investment Guarantor or an Affiliate of Transurban or of the Investment Guarantor, as applicable, is a party has been or at such time of execution will be duly authorized to execute each such document on behalf of Transurban, the Investment Guarantor or an Affiliate of Transurban or of the Investment Guarantor, as applicable.
- 8.3.4 Neither the execution and delivery by Transurban of this Agreement and the other Project Agreements executed by Transurban, the Investment Guarantor or an Affiliate of Transurban or of the Investment Guarantor, as applicable, concurrently herewith, nor the consummation of the transactions contemplated hereby or thereby, is in conflict with or will result in a default under or violation of any other agreements or instruments to which Transurban, the Investment Guarantor or an Affiliate of Transurban or of the Investment Guarantor, as applicable, is a party or by which it is bound.
- 8.3.5 There is no action, suit, proceeding, investigation, indictment or litigation pending and served on Transurban, the Investment Guarantor or an Affiliate of Transurban or of the Investment Guarantor, as applicable, which challenges the authority of Transurban, the Investment Guarantor or an Affiliate of Transurban or of the Investment Guarantor, as applicable,

to execute, deliver or perform, or the validity or enforceability of, this Agreement and the other Project Agreements to which Transurban, the Investment Guarantor or an Affiliate of Transurban or of the Investment Guarantor, as applicable, is a party, or which challenges the authority of the official executing this Agreement or the other Project Agreements to which Transurban or an Affiliate of Transurban or of the Investment Guarantor, as applicable, is a party, and Transurban has disclosed to the Department any pending and unserved or threatened action, suit, proceeding, investigation, indictment or litigation with respect to such matters of which Transurban is aware.

8.3.6 Transurban, Transurban Limited, the Investment Guarantor or an Affiliate of Transurban or of the Investment Guarantor, as applicable, is in material compliance with all Laws, Regulations and Ordinances applicable to Transurban, Transurban Limited, the Investment Guarantor or an Affiliate of Transurban or of the Investment Guarantor, as applicable, or its activities in connection with this Agreement and the other Project Agreements to which Transurban, Transurban Limited, the Investment Guarantor or an Affiliate of Transurban or of the Investment Guarantor, as applicable, is a party.

8.3.7 This Agreement constitutes the legal, valid and binding obligation of Transurban, enforceable in accordance with its terms.

8.4 Department Findings under PPTA. As of the date of execution of this Agreement, the Department, as the responsible public entity with respect to the Project, makes the following findings under the PPTA, which are independent of the on-going Environmental Review Process:

8.4.1 the design, construction, improvement and operation of the Project as contemplated by the Detailed Proposal and this Agreement serves the public purpose of the PPTA;

8.4.2 there is a public need for a transportation facility of the type contemplated by the Project;

8.4.3 the improvements contemplated by the Project, and the proposed interconnections with existing transportation facilities are reasonable and will not be incompatible with the STIP and local comprehensive plans;

8.4.4 the estimated cost of the Project, as reflected in the Detailed Proposal, is reasonable in relation to similar facilities; and

8.4.5 the Detailed Proposal will result in the timely acquisition, design and construction of the Project.

In making these findings, the Department has relied upon internal staff reports prepared by personnel familiar with transportation facilities similar to the Project and/or the advice of advisors or consultants having relevant experience.

## ARTICLE 9

### TERMINATION

#### 9.1 Termination Upon Expiration of Term.

Unless earlier terminated in accordance with the terms of this Article 9 or the other Project Agreements, all the rights and obligations of the parties hereunder and thereunder shall cease and terminate without notice or demand on December 31, 2065.

#### 9.2 Termination for Public Convenience.

9.2.1 If the Department determines in its sole discretion that such action is in the best interests of the State, the Department may terminate all of the rights and obligations of Fluor and Transurban, Transurban Limited, the Investment Guarantor or any Affiliates of Transurban or of the Investment Guarantor under this Agreement and the Project Agreements.

9.2.1.1 If the Department exercises its right of termination under Section 9.2.1, the Department shall deliver to Fluor and Transurban a Notice of Termination and thereafter the Department, Fluor and Transurban shall comply with the termination for convenience provisions of any Project Agreements in effect as of the date of termination or, in the Event no Project Agreements are then in effect which expressly govern termination for convenience as to Work Product, if any, furnished under this Agreement, Section 9.9.

9.2.1.2 In the event of a termination under Section 9.2.1:

- (a) prior to the initial Financial Closing Date, the Department will reimburse Fluor or Transurban, as applicable, for costs that, in the Department's reasonable discretion, are audited and reasonable ("qualifying costs"), which shall be determined in accordance with Chapter 7 of the Department's current "Guidelines for the Procurement and Management of Professional Services" attached hereto as Exhibit D with respect to costs covered thereby, as follows: (i) costs incurred after August 25, 2004, that are related to the Investment Grade Traffic and Revenue Study, and (ii) costs incurred on or after the Agreement Date, that are project development costs related primarily to the Project, including preliminary engineering and



permitting and attorney and other third-party advisors costs, but excluding any expenses for lobbying and any expenses for business development not related to the Project, of which Fluor and/or Transurban shall have provided the Department written notice prior to incurring such costs and to which the Department has not objected in writing within 10 Business Days after receipt of such notice, *provided* that such prior written notice (A) shall not be required with respect to third-party costs not in excess of \$50,000 per invoice and up to \$250,000 in the aggregate to any payee, and (B) with respect to activities to be performed by Fluor or Transurban employees shall describe the general nature of such activities on a quarterly basis and no further prior notice shall be required for such activities. Fluor and/or Transurban shall provide the Department written reports, in such form as shall be reasonably acceptable to the Department, of such cumulative qualifying costs incurred since August 25, 2004, as of the Agreement Date and as of the end of each calendar quarter thereafter commencing as of June 30, 2005, and continuing until the initial Financial Closing Date or earlier termination of this Agreement, within 10 Days after the end of such calendar quarter. Notwithstanding any other provision hereof or of any Project Agreement, (1) payment of any amounts reimbursed pursuant to this Section 9.2.1.2 shall be subject to appropriation by the General Assembly and allocation by CTB therefor and shall not accrue interest, and (2) if the source of original payment of any costs and expenses is public funds appropriated by the General Assembly and allocated by CTB, such costs and expenses shall not constitute qualifying costs hereunder; or

- (b) after the initial Financial Closing Date, the applicable Project Agreements, including without limitation the Project Financing Agreements, shall address compensation, if any, payable to any debt and/or equity holders in the event of a termination under Section 9.2.1.

### 9.3 Termination Related to ROD or Investment Grade Traffic and Revenue Study.

- 9.3.1 In the event that Fluor, Transurban or the Department determines that the Project is not consistent with the alternative selected through the Environmental Review Process (which determination shall be made within 30 Days after issuance of the ROD), any of Fluor, Transurban or the Department may terminate this Agreement upon 30 Days written notice to the other parties.

- 9.3.2 In the event that Fluor, Transurban or the Department determines that Project is not economically viable based on the results of the Investment Grade Traffic and Revenue Study (which determination shall be made within 90 Days after delivery of such study to the Department), any of Fluor, Transurban or the Department may terminate this Agreement upon 30 Days written notice to the other parties.
- 9.3.3 If the Department, Fluor or Transurban terminate this Agreement under Section 9.3.1 or Section 9.3.2, the party exercising its right of termination shall deliver to the other parties written notice of such termination and neither Fluor, Transurban nor the Department shall have any further obligations to each other with respect to the Project or any Project Agreement and shall not be entitled to any compensation hereunder, subject to Section 9.9.1, and each party shall bear its own costs and expenses (including without limitation attorney's fees, costs incurred for the Investment Grade Traffic and Revenue Study and preliminary engineering and development costs and expenses) incurred in connection with, arising out of or pertaining to the Project or this Agreement.
- 9.4 Termination for Event of Default. The Department shall have the right to terminate the rights of any Defaulting Party (as hereinafter defined) under this Agreement and the Project Agreements, or any of them, due to a Fluor Default or a Transurban Default, as applicable, and expiration, without full cure, of any available cure period provided hereunder or under any other Project Agreement or Project Financing Agreement. The Department and all other parties to this Agreement (other than Fluor, in the case of a Fluor Default, and Transurban, in the case of a Transurban Default (as applicable, the "Defaulting Party")) shall cooperate in good faith to identify and substitute as a party to this Agreement and any other Project Agreements to which the Defaulting Party's rights have been terminated by the Department pursuant to this Section 9.4 a Person that is mutually acceptable to the Department and such other parties. The Department's remedies against the Defaulting Party and limitations thereon following any such termination shall be as set forth in this Section 9.4, in Section 10.4 or in any other Project Agreement.
- 9.5 Termination for Failure to Meet Milestones.
- 9.5.1 If any Milestone with respect to a Phase set forth in Section 4.2.1, or agreed to in accordance with Section 4.2.2, is not achieved by the date set forth therein or agreed to, as applicable, as the same may be extended in accordance with Section 4.2.3, the Department may terminate this Agreement and any related Project Agreement with respect to such Phase and all subsequent Phases, upon 30 Days written notice to Fluor and Transurban.
- 9.5.2 If any Milestone with respect to a Phase set forth in Section 4.2.1 or agreed to in accordance with Section 4.2.2 is not achieved by the date set

forth therein or agreed to, as applicable, as the same may be extended in accordance with Section 4.2.3, for any reason outside the reasonable control of Fluor or Transurban, Fluor and/or Transurban may terminate this Agreement and any related Project Agreement with respect to such Phase and all subsequent Phases, upon 30 Days written notice to the Department.

- 9.5.3 If this Agreement and any other Project Agreements are terminated in whole or in part with respect to the Project or any such Phase in accordance with this Section 9.5, the parties shall have no other obligations to each other with respect to the Project or such Phase, as applicable, subject to Section 9.9.1, and each party shall bear its own costs and expenses (including without limitation attorney's fees, costs incurred for the Investment Grade Traffic and Revenue Study and preliminary engineering and development costs and expenses) incurred in connection with, arising out of or pertaining to the Project or this Agreement.

9.6 Termination for Debarment, Etc.

- 9.6.1 The Department shall have the right to terminate the rights of any Debarred Party, as herein defined, under this Agreement and any other Project Agreements if:

9.6.1.1 Fluor, Transurban or the Contractor Guarantor as applicable, (the "Debarred Party"), or any of their respective officers or management employees has been jointly or individually debarred or prohibited from participating in a Federally funded project, or debarred by the Department as a result of a violation by such Person of the Department's debarment policy set forth in Exhibit E (which shall apply to this Project), or debarred by any other agency of the State, or

9.6.1.2 the Debarred Party, or any of its officers or management employees, has been indicted or convicted of, or has pled guilty or nolo contendere to, a violation of State or Federal law involving fraud, conspiracy, collusion, bribery, perjury, material misrepresentation, or any other violation that shows a similar lack of moral or ethical integrity, as a result in whole or in part of activities relating to any project in Virginia.

- 9.6.2 If the Department exercises its right of termination under Section 9.6.1 above, the Department shall deliver written notice of such termination to Fluor and Transurban and neither the Debarred Party nor the Department shall have any further obligations to each other with respect to the Project or any Project Agreement and (a) prior to the initial Notice to Proceed, the Debarred Party shall not be entitled to any compensation under any Project Agreement except in accordance with Section 9.9.1, or (b) after the

initial Notice to Proceed, the Department shall pay to the Debarred Party any amounts due and owing for Work completed under the terminated Project Agreements through the date of termination, but shall not be responsible for any termination charges, including matters such as lost profits and demobilization costs. Notwithstanding the foregoing, the rights and obligations of all parties other than the Debarred Party under this Agreement and any other Project Agreements shall not be affected solely as a result of such termination of the rights of the Debarred Party.

- 9.6.3 The Department and all other parties to this Agreement (other than the Debarred Party) shall cooperate in good faith to identify and substitute as a party to this Agreement and any other Project Agreements to which the Debarred Party's rights have been terminated by the Department pursuant to Section 9.6.1, a Person that is mutually acceptable to the Department and such other parties.

9.7 Fluor and/or Transurban Actions Upon Termination.

- 9.7.1 Subject to Section 9.2, on the effective date of termination of this Agreement or the rights of Fluor and Transurban under this Agreement, Fluor and Transurban shall, deliver to the Department:

9.7.1.1 Project deliverables developed specifically for the Project; *provided, however*, that Fluor and Transurban shall retain rights to duplicate, distribute and display works derived from such reports, books, records, work product and intellectual property solely for Fluor's and Transurban's marketing purposes, as approved by Department in advance in writing, and *provided further* that Fluor and Transurban shall receive compensation for such materials, if any, solely in accordance with Section 9.9.1, or otherwise as may be specifically agreed to in writing by the Department; and

9.7.1.2 possession and control of the Project and Project Right of Way.

9.8 Exclusive Termination Remedies.

- 9.8.1 This Article 9, together with the express provisions on termination set forth in Section 10.4 and any other Project Agreements, set forth the entire and exclusive provisions and rights of the Department, Fluor and Transurban regarding termination of this Agreement and the Project Agreements to which they are a party, and any and all other rights to terminate at law or in equity are hereby waived to the maximum extent permitted by law.

9.9 Liability After Termination.

- 9.9.1 On the effective date of termination of this Agreement or the rights of Fluor and/or Transurban, in addition to any other obligation hereunder

Fluor and/or Transurban shall deliver or shall have delivered to the Department any Work Product authorized in writing by the Department, in its sole discretion, on or after the Agreement Date. The Department shall pay to Fluor and/or Transurban, as applicable, an amount equal to the fair value to the Department, if any, as determined by the Department in its reasonable discretion, of such Work Product delivered or previously delivered to the Department by Fluor and/or Transurban, in the case of a termination under Section 9.2.1 without duplication of any amounts payable under any Project Agreements then in effect pursuant to Section 9.2.1.2. Notwithstanding any other provision, any amounts payable pursuant to this Section 9.9.1 shall be subject to appropriation by the General Assembly and allocation by the CTB therefor and shall not accrue interest.

- 9.9.2 In the event this Agreement or any other Project Agreement is terminated by reason of an event of default, such termination shall not excuse the defaulting party from any liability arising out of such default as provided in the Project Agreements.
- 9.9.3 In the event this Agreement or any other Project Agreement is terminated by reason other than a default, no party shall have any further obligation or liability except for performance of their respective obligations which are either expressly stated in a Project Agreement to survive termination or by their sense and context are intended to survive termination.

## **ARTICLE 10**

### **DEFAULTS AND REMEDIES**

#### **10.1 Fluor Defaults.**

Each of the following events shall constitute a Fluor Default under this Agreement:

- 10.1.1 Fluor shall fail to timely observe or perform or cause to be observed or performed any material covenant, agreement, obligation, term or condition (other than the achievement of Milestones, as set forth in Section 4.2) required to be observed or performed by Fluor under this Agreement;
- 10.1.2 any representation or warranty made by Fluor herein, or by the Contractor Guarantor, or in any Project Agreement shall be inaccurate or misleading in any material respect on the date made or deemed made and a material adverse effect upon the Project or the Department's rights or obligations under the Project Agreements results therefrom;
- 10.1.3 Fluor shall fail to execute and deliver, or fail to cause the Contractor Guarantor to execute and deliver, any Project Agreement to which it is a party thereto as and when required under this Agreement;

- 10.1.4 Fluor shall commence a voluntary case seeking liquidation, reorganization or other relief with respect to itself or its debts under any bankruptcy, insolvency or other similar law now or hereafter in effect; shall seek the appointment of a trustee, receiver, liquidator, custodian or other similar official of Fluor or any substantial part of its assets; shall file an answer admitting the material allegations of a petition filed against Fluor in any involuntary case commenced against Fluor; shall consent to any such relief or to the appointment of or taking possession by any such official in any voluntary case commenced against Fluor; shall make an assignment for the benefit of creditors; shall fail, be unable, or admit in writing the inability generally to pay its debts as they become due; or shall take any action to authorize any of the foregoing, or any of the foregoing acts or events shall occur with respect to the Contractor Guarantor (but not necessarily in the same proceeding or concurrently);
- 10.1.5 an involuntary case shall be commenced against Fluor seeking liquidation, reorganization, dissolution, winding up, a composition or arrangement with creditors, a readjustment of debts or other relief with respect to Fluor or its debts under any bankruptcy, insolvency or other similar law now or hereafter in effect; seeking the appointment of a trustee, receiver, liquidator, custodian or other similar official of Fluor or any substantial part of its assets; seeking the issuance of a writ of attachment, execution, or similar process; or seeking like relief, and such involuntary case shall not be contested by Fluor in good faith or shall remain undismissed and unstayed for a period of 90 Days, or any such involuntary case or cases shall be commenced against the Contractor Guarantor (but not necessarily in the same proceeding or concurrently) and such case or cases shall not be contested by the Contractor Guarantor in good faith or shall remain undismissed and unstayed for a period of 90 Days; or
- 10.1.6 any event of default by Fluor under any Project Agreement to which Fluor is a party shall have occurred and be continuing.
- 10.2 Transurban Defaults. Each of the following events shall constitute a Transurban Default under this Agreement:
- 10.2.1 Transurban shall fail to timely observe or perform or cause to be observed or performed any material covenant, agreement, obligation, term or condition (other than the achievement of Milestones, as set forth in Section 4.2) required to be observed or performed by Transurban under this Agreement;
- 10.2.2 any representation or warranty made by Transurban, Transurban Limited, the Investment Guarantor or an Affiliate of Transurban or of the Investment Guarantor, as applicable, herein or in any Project Agreement shall be inaccurate or misleading in any material respect on the date made or deemed made and a material adverse effect upon the Project or the

Department's rights or obligations under the Project Agreements results therefrom;

- 10.2.3 Transurban, Transurban Limited, the Investment Guarantor or an Affiliate of Transurban or of the Investment Guarantor, as applicable, shall fail to execute and deliver any Project Agreement to which it is a party thereto as and when required under this Agreement;
- 10.2.4 Transurban or the Investment Guarantor shall commence a voluntary case seeking liquidation, reorganization or other relief with respect to itself or its debts under any bankruptcy, insolvency or other similar law now or hereafter in effect; shall seek the appointment of a trustee, receiver, liquidator, custodian or other similar official of Transurban, Transurban Limited or the Investment Guarantor or any substantial part of its assets; shall file an answer admitting the material allegations of a petition filed against Transurban, Transurban Limited or the Investment Guarantor in any involuntary case commenced against Transurban, Transurban Limited or the Investment Guarantor; shall consent to any such relief or to the appointment of or taking possession by any such official in any voluntary case commenced against Transurban, Transurban Limited or the Investment Guarantor; shall make an assignment for the benefit of creditors; shall fail, be unable, or admit in writing the inability generally to pay its debts as they become due; or shall take any action to authorize any of the foregoing;
- 10.2.5 an involuntary case shall be commenced against Transurban, Transurban Limited or the Investment Guarantor seeking liquidation, reorganization, dissolution, winding up, a composition or arrangement with creditors, a readjustment of debts or other relief with respect to Transurban, Transurban Limited or the Investment Guarantor or its debts under any bankruptcy, insolvency or other similar law now or hereafter in effect; seeking the appointment of a trustee, receiver, liquidator, custodian or other similar official of Transurban, Transurban Limited or the Investment Guarantor, as applicable, or any substantial part of its assets; seeking the issuance of a writ of attachment, execution, or similar process; or seeking like relief, and such involuntary case shall not be contested by Transurban, Transurban Limited or the Investment Guarantor, as applicable, in good faith or shall remain undismissed and unstayed for a period of 90 Days; or
- 10.2.6 any event of default by Transurban, Transurban Limited, the Investment Guarantor or an Affiliate of Transurban or of the Investment Guarantor, as applicable, under any Project Agreement to which Transurban, Transurban Limited, the Investment Guarantor or an Affiliate of Transurban or of the Investment Guarantor, as applicable, or its assigns is a party shall have occurred and be continuing.

- 10.3 Fluor and Transurban Cure Periods. Fluor and Transurban, as applicable, shall have the following cure periods:
- 10.3.1 With respect to all Fluor Defaults except those specified in Sections 10.1.4, 10.1.5 and 10.1.6, Fluor shall have a period of 30 Days from the date of the notice of default in which to cure the default. If the default is of such nature that the cure cannot with diligence be completed within such time period and Fluor has commenced meaningful steps to cure, as agreed to by the Department, then Fluor shall have an additional period of time as necessary to cure the default up to a maximum of 180 Days.
  - 10.3.2 With respect to Fluor Defaults specified in Sections 10.1.4 and 10.1.5, there shall be no additional time for cure beyond any periods of time mentioned therein.
  - 10.3.3 With respect to Fluor Default under Section 10.1.6, the cure period, if any, will be as set forth in any such Design-Build Contract.
  - 10.3.4 With respect to all Transurban Defaults except those specified in Sections 10.2.4, 10.2.5 and 10.2.6, Transurban shall have a period of 30 Days from the date of the notice of default in which to cure the default. If the default is of such nature that the cure cannot with diligence be completed within such time period and Transurban has commenced meaningful steps to cure, as agreed to by the Department, then Transurban shall have an additional period of time as necessary to cure the default up to a maximum of 180 Days.
  - 10.3.5 With respect to the Transurban Defaults specified in Sections 10.2.4 and 10.2.5, there shall be no additional time for cure beyond any periods of time mentioned therein.
  - 10.3.6 With respect to a Transurban Default under Section 10.2.6, the cure period, if any, will be as set forth in any such Tolling and Customer Service Agreement or other Project Agreement, as applicable.
- 10.4 Department Remedies for Fluor Default or Transurban Default. Upon the occurrence and during the continuation of a Fluor Default or a Transurban Default, as applicable, and expiration, without full cure, of any applicable cure period as provided in Section 10.3, the Department may exercise any one or more of the following remedies as the Department in its sole and absolute discretion shall determine:
- 10.4.1 with respect to a Fluor Default (other than those specified in Section 10.1.6) and a Transurban Default (other than those specified in Section 10.2.6), any and all remedies available at law or in equity, including but not limited to recovery of damages to the extent provided by law; provided that in no event shall Fluor or Transurban be liable, and Department waives all Claims, for indirect, incidental or consequential damages of any



nature, whether in contract, tort (including negligence) or other legal theory, unless arising out of the fraud or intentional misrepresentation of Fluor or Transurban or any of their directors, officers, employees or agents;

10.4.2 with respect to Fluor Defaults specified in Section 10.1.6 and Transurban Defaults specified in Section 10.2.6, any applicable remedies set forth in the Design-Build Contract or the Tolling and Customer Service Agreement or other Project Agreement, as applicable, respectively;

10.4.3 with respect to Fluor Defaults offset against (a) any sums the Department owes to Fluor under any Project Agreement (b) any sums owing to the Department from Fluor under any Project Agreement, including without limitation any Liquidated Damages or other undisputed or finally adjudicated monetary damages owed to the Department;

10.4.4 with respect to Transurban Defaults, offset against (a) any sums the Department owes to Transurban under any Project Agreement (b) any sums owing to the Department from Transurban under any Project Agreement, including without limitation any Liquidated Damages or other undisputed or finally adjudicated monetary damages owed to the Department;

10.4.5 with respect to Fluor Defaults, terminate Fluor's rights under this Agreement and any other Project Agreements to which Fluor is a party as a "Defaulting Party" in accordance with Section 9.4;

10.4.6 with respect to Transurban Defaults, terminate Transurban's rights under this Agreement and any other Project Agreements to which Transurban is a party as a "Defaulting Party" in accordance with Section 9.4; and

10.4.7 the Department may satisfy any sums Fluor owes the Department, including, without limitation, any liquidated damages and other undisputed or finally adjudicated monetary damages, by offset against future Fluor draw requests under the Design-Build Contract or any other Project Agreement.

#### 10.5. Department Defaults.

10.5.1 Each of the following events shall constitute a Department Default:

10.5.1.1 the Department shall fail to observe or perform any covenant, agreement, term or condition (other than the achievement of Milestones, as set forth in Section 4.2) required to be observed or performed by the Department under this Agreement;

10.5.1.2 any representation or warranty made by the Department herein or in any other Project Agreement to which Fluor or

Transurban is a party shall be inaccurate or misleading in any respect on the date made and a material adverse effect upon the Project or the rights or obligations of Fluor or Transurban under such Project Agreements results therefrom;

10.5.1.3 an event of default by the Department occurs under any other Project Agreement;

10.5.1.4 the General Assembly shall enact legislation, and such legislation shall become effective, which (a) the State intends to impact and does impact, only Fluor, Transurban, this Agreement or the Project; and (b) materially impairs the rights of Fluor and/or Transurban under this Agreement to plan, and cause the development and construction of the Project, all as provided for in this Agreement and the other Project Agreements; or

10.5.1.5 failure by the Department to execute and deliver any Project Agreement, as and when required under this Agreement.

10.5.2 Except as set forth in Section 10.5.1.4 above, each of Fluor and Transurban acknowledges that no act or omission of any Federal, State, regional or local government or agency thereof, other than the Department, shall constitute a Department Default hereunder, unless as a result of material involvement in such act or omission on the part of Department.

10.6 Department Cure Periods. The Department shall have the following cure periods with respect to the following Department Defaults:

10.6.1 with respect to a Department Default under Sections 10.5.1.1, 10.5.1.2, and 10.5.1.5, a period of 30 Days after the Department receives written notice of the Department Default, provided that if the Department Default is of such a nature that the cure cannot with diligence be completed within such time period and the Department has commenced meaningful steps to cure immediately after receiving the default notice, the Department shall have such additional period of time as is reasonably necessary to diligently effect cure;

10.6.2 with respect to a Department Default under Section 10.5.1.3, the cure period, if any, set forth in the relevant Project Agreement; and

10.6.3 with respect to a Department Default under Section 10.5.1.4, a period of 180 Days after the date the subject legislation becomes law; provided that, if the effectiveness of such legislation is stayed by a court of law, the running of such 180-Day cure period shall be suspended for the duration of any such stay.

10.7 Fluor and Transurban Remedies Upon Department Default.

10.7.1 Except as otherwise provided herein, upon the occurrence of a Department Default and expiration, without full cure, of any cure period available with respect to such Department Default, Fluor and/or Transurban may exercise any rights and remedies available to Fluor and/or Transurban under this Agreement or the other Project Agreements to which they are a party or as are otherwise available to Fluor and/or Transurban at law; *provided, however,*

10.7.1.1 Fluor and Transurban shall have no right to seek or obtain equitable relief against the Department arising out of a Department Default except (a) writ of mandamus to the extent available, (b) equitable remedies regarding monetary compensation and (c) equitable remedies available in the case of a Department Default resulting from action by the Department which is outside the Department's legal authority; and

10.7.1.2 the Department's obligations and liabilities are strictly limited to those set forth in the Project Agreements, and neither Fluor nor Transurban shall have nor may they assert, and shall waive, any Claim against the Department based on any supposed or alleged duties arising in tort.

10.7.2 Notwithstanding anything herein to the contrary, the recovery of Claims against the State shall be subject to all Laws, Regulations and Ordinances, including without limitation, Title 8.01, Chapter 3, Article 18 (commencing at Section 8.01-192) and Article 18.1 (commencing at Section 8.01-195.1), Code of Virginia.

10.7.3 Except as otherwise provided in Section 10.7.4, the Department's payment of any monetary damages or other compensation or award under Section 10.7.1 shall be conditioned upon express legislative authorization and appropriation of the payment to Fluor and/or Transurban of such damages, compensation or award.

10.7.4 Promptly after any final judgment is rendered by a court of competent jurisdiction awarding compensation or damages to Fluor and/or Transurban and all appeal rights are exhausted, the Department shall institute payment procedures as set forth in Title 8.01, Section 195, Code of Virginia.

10.7.5 If Fluor and/or Transurban has not received the full amount of any outstanding monetary damages or other compensation or award owing to Fluor and/or Transurban under Section 10.7.1 the Department shall (a) use reasonably diligent efforts to obtain as soon as practicable from

the General Assembly an appropriation sufficient to make such payment, and (b) include such payment amount in its annual budget request, for two legislative sessions, if necessary, and diligently seek an appropriation to make such payment.

10.8 Waiver of Consequential Damages. None of the Department, Fluor, the Contractor Guarantor or Transurban shall be entitled, and each of them waives all right, to recover indirect, incidental or consequential damages, including but not limited to lost profits, whether such damages arise in contract, tort or other legal theory, and irrespective of fault, negligence or strict liability, except and only to the extent specifically provided otherwise herein or in any of the other Project Agreements.

10.9 Dispute Resolution; No Declaratory Judgment Procedure.

10.9.1 Any dispute that may arise between (a) the Department and (b) Fluor and/or Transurban shall be mutually resolved through best efforts and good faith negotiations among the Authorized Department Representatives, the Authorized Fluor Representative and/or the Authorized Transurban Representative, as applicable. In conducting such negotiations, the Department, Fluor and Transurban recognize that in drafting this Agreement, it is impracticable to make provisions for every contingency that may arise during its term. Accordingly, in order to achieve the resolution of any dispute concerning matters for which this Agreement provides no clear guidance, the Department, Fluor and Transurban concur in the principle that this Agreement is intended to operate between them in fairness. If, despite best efforts and good faith negotiations and the application of the principle of fairness in the claims set forth above, the dispute is not resolved to the mutual satisfaction of both parties within 30 Days after written notification of a problem or claim arising that remains in dispute, or such longer time as is mutually agreed, then such dispute shall first be submitted administratively as set forth below.

10.9.1.1 Fluor and/or Transurban shall submit to the Department a written claim, an original and three legible copies, which shall set forth the facts upon which the claim is based. Fluor and/or Transurban shall include all pertinent data and correspondence that may substantiate the claim. Within 90 Days from the receipt of the claim, the Department will make an investigation and notify Fluor and/or Transurban by registered mail of its decision. However, by mutual agreement, the Department and Fluor and/or Transurban may extend the 90-Day period for another 30 Days.

10.9.1.2 If Fluor and/or Transurban is dissatisfied with the decision, it shall notify the Commissioner in writing, within 30 Days from the receipt of the Department's decision, that it desires to appear

before him, whether in person or through counsel, and present additional facts and arguments in support of this claim. The Commissioner, or his designee, will schedule and meet with Fluor and/or Transurban within 30 Days after receiving the request. However, the Commissioner and Fluor and/or Transurban, by mutual agreement, may schedule the meeting to be held after 30 Days but before the 60<sup>th</sup> Day from the receipt of the written request from Fluor and/or Transurban. Within 45 Days from the date of the meeting, the Commissioner, or his designee, will investigate the claim, including the additional facts presented, and notify Fluor and/or Transurban in writing of his decision. However, the Commissioner and Fluor and/or Transurban, by mutual agreement, may extend the 45-Day period for another 30 Days. If the Commissioner deems that all or any portion of a claim is valid, he shall have the authority to negotiate a settlement with Fluor and/or Transurban subject to the provision of Section 2.2-514 of the Code of Virginia.

- 10.9.1.3 If Fluor and/or Transurban is dissatisfied with the decision of the Commissioner, it may institute a civil action as to such portion of the claim as is denied by the Commissioner pursuant to Section 33.1-387 of the Code of Virginia.
- 10.9.2 All litigation between the parties arising out of or pertaining to this Agreement or its breach shall be filed, heard and decided in any applicable Circuit Court of the State, which shall have exclusive jurisdiction and venue; provided that the foregoing does not affect any claims or matters which are governed by a different dispute resolution procedure set forth in any other Project Agreement.
- 10.9.3 Each party shall bear its own attorney's fees and costs in any dispute or litigation arising out of or pertaining to this Agreement or any other Project Agreement, and no party shall seek or accept an award of attorney's fees or costs.
- 10.9.4 As permitted by Section 56-568 of the PPTA as it exists on the date hereof, the parties agree that any requirement that the State Corporation Commission issue a declaratory judgment regarding a material default (as defined in Section 56-557 of the PPTA) pursuant to such Section 56-568, as a prerequisite to exercising any remedy set forth in this Agreement, any other Project Agreements or such Section 56-568, shall not apply to this Agreement or any other Project Agreement.

## ARTICLE 11

### RECORDS, REPORTS, WORK PRODUCT AND INTELLECTUAL PROPERTY

#### 11.1 Maintenance of Records; Work Product.

11.1.1 Fluor and Transurban each shall file and maintain a complete set of all books and records prepared or employed by such party in its management, scheduling, cost accounting and otherwise with respect to the Project. Fluor and Transurban shall grant to Department such audit rights and allow Department such access to and the right to copy such books and records as Department may request, but only as necessary and appropriate in connection with Work to be performed on a reimbursable cost basis, issuance of change orders (other than all or a portion of change orders issued on a lump sum basis), and the resolution of disputes.

11.1.2 The rights of the Department, Fluor and Transurban in any drawings, intellectual property and documents, including those in electronic form, furnished by a Fluor Party in performance of the Design-Build Contract or by a Transurban Party in performance of the Tolling and Customer Service Agreement or any other Project Agreement to which Fluor or Transurban is a party shall be determined in accordance with the Project Agreement pursuant to which such materials are furnished.

#### 11.2. Public Records.

11.2.1 Any Work Product the Department owns pursuant to any Project Agreement, and any document of which the Department obtains a copy, may be considered public records under the Virginia Public Records Act, Section 42.1-76 through 42.1-91, Code of Virginia or official records under the Virginia Freedom of Information Act, Sections 2.2-3700 through 2.2-3714 of the Code of Virginia, as amended (the "Virginia Freedom of Information Act"), and as such may be subject to public disclosure. The Department recognizes that certain Work Product the Department owns pursuant to the Project Agreements and certain documents of which the Department obtains a copy may contain information exempt from disclosure under Section 2.2-3705, Code of Virginia, may constitute trade secrets as defined in Section 59.1-336, Code of Virginia, and may include confidential information which is otherwise subject to protection from misappropriation or disclosure. Should such records become the subject of a request for public disclosure, the Department shall respond as follows:

11.2.1.1 The Department shall use reasonable efforts to immediately notify Fluor and/or Transurban of such request and the date by which it anticipates responding.

- 11.2.1.2 Fluor and/or Transurban must then assert in writing to the Department any claim that such records contain proprietary information that is exempt from disclosure under the Virginia Freedom of Information Act, or is subject to protection pursuant to Section 59.1-339, Code of Virginia, or other State law so that the Department may consider such assertion in responding to the requester.
  - 11.2.1.3 If Fluor and/or Transurban fails to make such assertion within three Business Days after the date the Department notifies Fluor and/or Transurban of its intended response, the Department shall have the right to make such disclosure.
  - 11.2.1.4 If Fluor and/or Transurban makes a timely assertion that the requested records contain proprietary information, trade secrets or confidential information and thus are exempt from disclosure or otherwise protected under State law, upon consultation with Fluor and/or Transurban to agree upon a reasonable effort and legal cost, at the expense of Fluor and/or Transurban, the Department and Fluor and/or Transurban shall seek judicial declaration of the rights of the parties. Until such declaration is made, the Department will maintain the confidentiality of such records.
  - 11.2.1.5 If the Department's denial of a request for disclosure of records is challenged in court, Fluor and/or Transurban shall assist the Department in its defense and shall indemnify the Department for any and all damages assessed and costs (including the fees and costs of the Department's attorneys) the Department incurs in such defense, including any attorney's fees assessed against the Department or any State Indemnitee.
  - 11.2.1.6 In no event shall the Department be liable to Fluor and/or Transurban as a result of any disclosure of such records by the Department in compliance with the provisions of this Section 11.2.1.
- 11.2.2 If Fluor and/or Transurban believes that any Work Product or any document subject to transmittal to or review by the Department under the terms of this Agreement or any other Project Agreement contains proprietary or confidential information or trade secrets that are exempt or protected from disclosure pursuant to State law, Fluor and/or Transurban shall use its reasonable efforts to identify such information prior to such transmittal or review and it and the Department shall confer on appropriate means of ensuring compliance with applicable laws prior to transmittal or review. Upon the written request of any party to this Agreement, Fluor, Transurban, and the Department shall mutually develop a protocol for the

transmittal, review and disclosure of Work Product or other documents produced or obtained by Fluor and/or Transurban so as to avoid violations of any Laws, Regulations and Ordinances.

11.3. Reporting Requirements and Inspection and Audit Rights.

11.3.1 Fluor and Transurban shall deliver to the Department financial and narrative reports, statements, certifications, budgets and information as and when required under this Agreement and the PPTA.

11.3.2 The Department shall have audit rights respecting Fluor and/or Transurban as set forth in Section 11.1.1 and in the Project Agreements, and the FHWA shall have such audit rights, if any, respecting Fluor, Transurban and the Project as shall be provided in accordance with applicable Federal Laws, Regulations and Ordinances.

11.3.3 Nothing contained in this Agreement or any other Project Agreement shall in any way limit the constitutional and statutory powers, duties and rights of elected state officials, including the independent rights of the State Auditor of Public Accounts, in carrying out his or her legal authority.

## **ARTICLE 12**

### **RESERVED RIGHTS**

12.1. Exclusions from Interests. Fluor and/or Transurban's rights and interests in the Project and Project Right of Way shall be specifically limited only to such rights and interests which are necessary and required for Project Purposes. Fluor and/or Transurban's rights and interests specifically exclude all Reserved Rights.

12.2. Department Reservation of Rights. All rights to own, lease, sell, assign, transfer, utilize, develop or take advantage of the Reserved Rights are hereby reserved to the Department; and Fluor and/or Transurban shall not engage in any activity infringing upon the Reserved Rights. The Department at any time may devote, use or take advantage of the Reserved Rights for any public purpose without any financial participation whatsoever by Fluor and/or Transurban. The Department hereby reserves to itself all ownership, development, maintenance, repair, replacement, operation, use and enjoyment of, and access to, the Reserved Rights. No Department activity or improvement respecting Reserved Rights shall materially interfere with the construction, operation, maintenance or tolling of the Project.

12.3. Disgorgement. If a Fluor Default or a Transurban Default concerns a breach of the provisions of Sections 12.1 or 12.2, in addition to any other remedies under this Agreement, the Department shall be entitled to disgorgement of all profits



from the prohibited activity and to sole title to and ownership of the prohibited assets and improvements.

- 12.4. Alternate Treatment of Reserved Rights. Notwithstanding Sections 12.1, 12.2 and 12.3, the Department may elect in its sole discretion to undertake the development of improvements respecting Reserved Rights.

## ARTICLE 13

### MISCELLANEOUS

#### 13.1 Assignment.

13.1.1 Neither Fluor nor Transurban may, without the prior written consent of the Department, voluntarily or involuntarily assign, convey, transfer, pledge, mortgage or otherwise encumber its rights or interests under this Agreement or, unless expressly permitted thereby, the other Project Agreements *provided*, that (a) Fluor shall be permitted to transfer its rights, obligations and interests under this Agreement to an Affiliate so long as Fluor Corporation, a Delaware corporation, guarantees such Person's obligations under this Agreement pursuant to a guaranty substantially in the form of the Completion Guaranty, (b) Transurban shall be permitted to transfer its rights, obligations and interests under this Agreement to an Affiliate of Transurban or of the Investment Guarantor so long as (i) the Guaranty of Investment Obligations and the Investment Funding Commitment described in Section 3.2.5.3 remain in full force and effect, and (ii) a guaranty, surety bond, letter of credit issued by a United States bank or a United States branch of a foreign bank or other assurance of performance, which shall be acceptable to the Department, with respect to such transferee's obligation is provided in accordance with Sections 3.2.5.2 and 3.3.6, and (c) if either Fluor or Transurban transfers its rights and interests under this Agreement to an Affiliate that is jointly-owned by Fluor and Transurban, any requirements of clauses (a) and (b) of this Section 13.1.1 may be provided by each of Fluor and Transurban, including as otherwise permitted under such clauses (a) and (b), in direct proportion to the percentage of its equity ownership interest in such Affiliate.

13.1.2 Any transfer of the right or practical ability to control the policies and decisions of Fluor and/or Transurban (except, in the case of Fluor, transfers occurring after the Final Completion Date), whether due to transfer of more than 50% of the partnership or membership interests, shares, beneficial interests or otherwise, shall constitute an assignment prohibited under Section 13.1.1 without the Department's prior written consent.

- 13.1.3 The Department may transfer and assign its interests in the Project, this Agreement and any other Project Agreements to any other public agency or public entity as permitted by law, provided that the successor or assignee has assumed all of the Department's obligations, duties and liabilities under this Agreement and the Project Agreements then in effect, and has provided Fluor and Transurban with reasonable assurance of its legal and financial authority, ability and resources to honor and perform the same.
- 13.1.4 If any party changes its name, such party agrees to promptly furnish each of the other parties with written notice of change of name and appropriate supporting documentation.
- 13.2 No Gift or Dedication. Nothing contained in this Agreement shall be deemed to be a gift or dedication of any portion of the Project, Project Right of Way or Work Product to the Department or the general public or for any public use or purpose whatsoever, or be deemed to create any rights in the Project, Project Right of Way or Work Product except as expressly set forth herein.
- 13.3 Notices.
- 13.3.1 Whenever under the provisions of this Agreement it shall be necessary or desirable for one party to serve any notice, request, demand, report or other communication on another party, the same shall be in writing and shall not be effective for any purpose unless and until actually received by the addressee or unless served (a) personally, (b) by independent, reputable, overnight commercial courier, (c) by facsimile transmission, where the transmitting party includes a cover sheet identifying the name, location and identity of the transmitting party, the phone number of the transmitting device, the date and time of transmission and the number of pages transmitted (including the cover page), where the transmitting device or receiving device records verification of receipt and the date and time of transmission receipt and the phone number of the other device, and where the facsimile transmission is immediately followed by service of the original of the subject item in another manner permitted herein, or (d) by deposit in the United States mail, postage and fees fully prepaid, registered or certified mail, with return receipt requested, addressed as follows:

If to the Department:                      Virginia Department of Transportation  
1401 E. Broad Street  
Richmond, VA 23219  
Attn: Chief Engineer  
Facsimile: (804) 786-2940

*With copies to:*

Virginia Department of Transportation

14685 Avion Parkway  
Chantilly, VA 20151  
Attn: Rte. 495 HOT Lanes PPTA Project Manger  
Facsimile: (703) 383-2190

Office of the Attorney General  
900 E. Main Street  
Richmond, VA 23219  
Attn: Richard L. Walton Jr., Esq.  
Facsimile: (804) 786-9136

If to Fluor:

Fluor Enterprises, Inc.  
100 Fluor Daniel Drive  
Greenville, SC 29607-2762  
Attn: Robert Free  
(title) Controller  
Facsimile: (864) 281-8818  
*and*  
Attn: Richard A. Fierce  
(title) General Counsel  
Facsimile: (864) 281-6868

If to Transurban:

Transurban (USA) Inc.  
c/o CT Corporation System  
1209 Orange Street  
Wilmington, DE 19801

*With a copy to:*

Company Secretary, Transurban Limited  
Level 43 Rialto South Tower  
525 Collins Street  
Melbourne Vic 3000, Australia  
Facsimile: (613) 9649-7380

- 13.3.2 Any party may, from time to time, by notice in writing served upon the other party as aforesaid, designate an additional and/or a different mailing address or an additional and/or a different person to whom all such notices, requests, demands, reports and communications are thereafter to be addressed. Any notice, request, demand, report or other communication served personally shall be deemed delivered upon receipt, if served by mail or independent courier shall be deemed delivered on the date of receipt as shown by the addressee's registry or certification receipt or on the date receipt at the appropriate address is refused, as shown on the records or manifest of the United States Postal Service or independent courier, and if served by facsimile transmission shall be deemed delivered

on the date of receipt as shown on the received facsimile (provided the original is thereafter delivered as aforesaid).

13.4 Binding Effect. Subject to the limitations of Section 13.1, this Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective legal representatives, successors and permitted assigns, and wherever a reference in this Agreement is made to any of the parties hereto, such reference also shall be deemed to include, wherever applicable, a reference to the legal representatives, successors and permitted assigns of such party, as if in every case so expressed.

13.5 Relationship of Parties.

13.5.1 The relationship of Fluor and Transurban to the Department shall be one of independent contractors, not agents, partners, joint venturers or employees, and the Department shall have no rights to direct or control the activities of Fluor and/or Transurban.

13.5.2 Officials, employees and agents of the Department shall in no event be considered employees, agents, partners or representatives of Fluor or Transurban.

13.6 No Third Party Beneficiaries. Nothing contained in this Agreement is intended or shall be construed as creating or conferring any rights, benefits or remedies upon, or creating any obligations of the parties hereto toward, any person or entity not a party to this Agreement.

13.7 Waiver.

13.7.1 No waiver by any party of any right or remedy under this Agreement or the other Project Agreements shall be deemed to be a waiver of any other or subsequent right or remedy under this Agreement or the other Project Agreements. The consent by one party to any act by the other party requiring such consent shall not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

13.7.2 No act, delay or omission done, suffered or permitted by one party or its agents shall be deemed to waive, exhaust or impair any right, remedy or power of such party under this Agreement or any other Project Agreement, or to relieve the other party from the full performance of its obligations under this Agreement and the other Project Agreements.

13.7.3 No waiver of any term, covenant or condition of this Agreement shall be valid unless in writing and signed by the obligee party.

13.7.4 The acceptance of any payment or reimbursement by a party shall not:  
(a) waive any preceding or then-existing breach or default by the other

party of any term, covenant or condition of this Agreement, other than the other party's prior failure to pay the particular amount or part thereof so accepted, regardless of the paid party's knowledge of such preceding or then-existing breach or default at the time of acceptance of such payment or reimbursement; or (b) continue, extend or affect (i) the service of any notice, any suit, arbitration or other legal proceeding or final judgment, (ii) any time within which the other party is required to perform any obligation or (iii) any other notice or demand.

13.7.5 No custom or practice between the parties in the administration of the terms of this Agreement shall be construed to waive or lessen the right of a party to insist upon performance by the other party in strict compliance with the terms of this Agreement.

13.8 No Brokers. Each party represents and warrants that it has not dealt with any real estate or business opportunity broker or agent or any finder in connection with this Agreement. To the extent permitted by law, each party agrees to indemnify, protect, defend with counsel acceptable to the other party and hold harmless the other party against any claim for commission, finder's fee or like compensation asserted by any real estate or business opportunity broker, agent, finder or other person claiming to have dealt with the indemnifying party in connection with this Agreement.

13.9 Governing Law and Venue. This Agreement and all Project Agreements shall be governed and construed in accordance with the laws of the State applicable to contracts executed and to be performed within the State. Venue for any legal action arising out of this Agreement shall be as provided for in Section 10.9.2.

13.10. Use of Police Power. Nothing in this Agreement limits the authority of the Department to exercise its regulatory and police powers granted by law, including but not limited to its powers of condemnation with respect to all or any part of the Project, the Project Right of Way and any of the rights of Fluor and/or Transurban hereunder. The parties waive any requirement by the State Corporation Commission to issue a declaratory judgment regarding condemnation pursuant to Title 56, Chapter 22, Section 56-568, Code of Virginia.

13.11 Survival. All representations and warranties made in or pursuant to this Agreement shall be deemed continuing and made at and as of the date of this Agreement and at and as of all other applicable times during the Term. All representations and warranties made in or pursuant to this Agreement, unless provided otherwise, shall survive for 10 years beyond the later of (a) the expiration or earlier termination of this Agreement, or (b) in the case of Fluor, the completion of Work on the Project, and in the case of Transurban, the end of the term of all Tolling and Customer Service Agreements, and any Asset Management agreements or the long-term concession agreement, as applicable, and shall not be waived by the execution and delivery of this Agreement, by completion of construction, by any investigation by the Department or by any

other event except a specific written waiver by the party against whom waiver is asserted; *provided, however*, that the 10 year limitation on survival shall not apply in the event of fraud or a material misrepresentation with respect to a particular representation or warranty, and *provided further* that survival of provisions of any other Project Agreement shall be as provided therein.

13.12 Subpoena. Except as provided for in Virginia Code Section 33.1-4, Fluor and/or Transurban may subpoena any Department personnel provided that Fluor and/or Transurban shall pay for such personnel's time at its fully burdened rate (including overhead and fringe benefits), together with all out-of-pocket expenses incurred, no later than 30 Days after Fluor's and/or Transurban's receipt by Fluor and/or Transurban of an invoice reasonably documenting the amount of such time provided and expenses. If the Department subpoenas Fluor's and/or Transurban's personnel of Fluor and/or Transurban in connection with any litigation, the Department shall pay for such personnel's time at its fully burdened rate together with all out-of-pocket expenses incurred determined in accordance with the Department's "Guidelines for the Procurement and Management of Professional Services", no later than 30 Days after the Department's receipt of an invoice reasonably documenting the amount of such time provided and expenses.

13.13 Litigation. In the event of litigation related to this Agreement or concerning the Project, the parties will confer as to whether it is in their mutual interest to enter into a joint defense agreement. Fluor, Transurban and the Department shall each bear their own litigation costs in such situations.

13.14 Construction and Interpretation of Agreement.

13.14.1 The language in all parts of this Agreement shall in all cases be construed simply, as a whole and in accordance with its fair meaning and not strictly for or against any party. The parties hereto acknowledge and agree that this Agreement has been prepared jointly by the parties and has been the subject of arm's length and careful negotiation over a considerable period of time, that each party has been given the opportunity to independently review this Agreement with legal counsel, and that each party has the requisite experience and sophistication to understand, interpret and agree to the particular language of the provisions hereof. Accordingly, in the event of an ambiguity in or dispute regarding the interpretation of this Agreement, this Agreement shall not be interpreted or construed against the party preparing it, and instead other rules of interpretation and construction shall be utilized.

13.14.2 The parties hereto hereby express their intention to be mutually bound by the provisions in this Agreement and, subject to Section 3.1.2, that this Agreement be valid, binding and enforceable as to each of them, in accordance with the terms of this Agreement. If, however, any term or provision of this Agreement, the deletion of which would not adversely affect the receipt of any material benefit by either party hereunder, shall be

held by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Agreement shall not be affected thereby and each other term and provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law. Without limitation, the parties agree that the provisions of Sections 4.1.2, and 9.2.1.2 shall be binding and enforceable as they relate to reimbursement of certain costs incurred by Fluor and Transurban in reliance on the binding nature of this Agreement. It is the intention of the parties to this Agreement, and the parties hereto agree, that in lieu of each clause or provision of this Agreement that is illegal, invalid or unenforceable, the parties in good faith shall supply as a part of this Agreement an enforceable clause or provision as similar in terms to such illegal, invalid or unenforceable clause or provision as may be possible.

13.14.3 The captions of the articles, sections and subsections herein are inserted solely for convenience and under no circumstances are they or any of them to be treated or construed as part of this instrument.

13.14.4 References in this instrument to this “Agreement” mean, refer to and include this instrument as well as any riders, exhibits, addenda and attachments hereto (which are hereby incorporated herein by reference) or other documents expressly incorporated by reference in this instrument. Any references to any covenant, condition, obligation and/or undertaking “herein,” “hereunder” or “pursuant hereto” (or language of like import) mean, refer to and include the covenants, conditions, obligations and undertakings existing pursuant to this instrument and any riders, exhibits, addenda, attachments or other documents affixed to or expressly incorporated by reference in this instrument. All terms defined in this instrument shall be deemed to have the same meanings in all riders, exhibits, addenda, attachments or other documents affixed to or expressly incorporated by reference in this instrument unless the context thereof clearly requires the contrary. Unless expressly provided otherwise, all references to Articles and Sections refer to the Articles and Sections set forth in this Agreement. Unless otherwise stated in this Agreement or the Project Agreements, words which have well-known technical or construction industry meanings are used in this Agreement or the Project Agreements in accordance with such recognized meaning.

13.14.5 As used in this Agreement and as the context may require, the singular includes the plural and vice versa, and the masculine gender includes the feminine and vice versa.

13.14.6 This Agreement, its exhibits and the other Project Agreements are intended to be complementary and consistent with each other and shall, to the maximum extent possible, be construed according to such intent.

13.15 Counterparts. This instrument may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

13.16 Entire Agreement; Severability.

13.16.1 THIS AGREEMENT AND THE OTHER PROJECT AGREEMENTS (INCLUDING EXHIBITS HERETO AND THERETO) CONSTITUTE THE ENTIRE AND EXCLUSIVE AGREEMENT BETWEEN THE PARTIES RELATING TO THE SPECIFIC MATTERS COVERED HEREIN AND THEREIN. ALL PRIOR OR CONTEMPORANEOUS VERBAL OR WRITTEN AGREEMENTS, UNDERSTANDINGS, REPRESENTATIONS AND / OR PRACTICES RELATIVE TO THE FOREGOING ARE HEREBY SUPERSEDED, REVOKED AND RENDERED INEFFECTIVE FOR ANY PURPOSE. NO VERBAL AGREEMENT OR IMPLIED COVENANT SHALL BE HELD TO VARY THE TERMS HEREOF, ANY STATUTE, LAW OR CUSTOM TO THE CONTRARY NOTWITHSTANDING.

13.16.2 This Agreement and the other Project Agreements attempt to set forth in full all requirements applicable under the PPTA as to the acquisition, construction, improvement, financing, maintenance and/or operation of the Project and attempt to define in full the rights and responsibilities of each party in connection therewith. To the extent requirements and rights and responsibilities have not been addressed in this Agreement and the other Project Agreements, the parties agree to carry out their respective responsibilities in the spirit of cooperation contemplated by the PPTA, recognizing that they may not have defined in a sufficient detail or anticipated fully all activities necessary for the full implementation of the Project.

13.16.3 If any provisions of this Agreement are rendered obsolete or ineffective in serving their purpose by Change in Law, passage of time, financing requirements or other future events or circumstances, the parties agree to negotiate in good faith appropriate amendments to or replacements of such provisions in order to restore and carry out the original purposes thereof to the extent practicable; *provided, however*, that neither party is obligated to agree to any amendment or replacement which would reduce its rights or enlarge its responsibilities under this Agreement in any material respect.

13.17 Amendment. This Agreement may be altered, amended or revoked only by an instrument in writing signed by each party hereto, or their respective successors or permitted assignees. The parties intend to amend and restate this Agreement, subject to the terms and conditions hereof upon completion of the Environmental Review Process and issuance of a ROD, as necessary to conform the Project Agreements and Project Financing Agreements to the ROD, other environmental and United States Department of Transportation requirements applicable to the



Project and the results of any applicable Investment Grade Traffic and Revenue Study. Prior to (a) execution of the Design-Build Contract, any Tolling and Customer Service Agreement or a long-term concession agreement with respect to any Phase of the Project, and (b) the initial Financial Closing Date, this Agreement shall be amended and restated to, among other things, (i) grant to a Transurban Party, an Issuer or such other Person as shall be identified in a Plan of Finance, and its permitted assigns in relation to the Plan of Finance, the exclusive right to charge and collect user fees in accordance with Section 56-566.B of the PPTA, (ii) make provisions for toll rates consistent with the Plan of Finance, (iii) make such additions or revisions as the parties deem necessary or appropriate to finance under a tax-exempt or taxable structure, as applicable, the Project (or any Phase, as applicable), including, without limitation, provisions relating to redemption, purchase or defeasance of any then outstanding bonds or equity upon termination of this Agreement, and (iv) make such other changes or as may be required to comply with the PPTA.

- 13.18 Headings. The Article and Section headings and the use of terms “Article” and “Section” in this Comprehensive Agreement and other Project Agreements are for convenience of reference only and shall not be deemed to alter or affect the meaning or interpretation of any provisions hereof.

**IN WITNESS WHEREOF**, the parties, intending to be legally bound, have executed this Agreement as of the date first written above.

**VIRGINIA DEPARTMENT OF TRANSPORTATION,**  
a department of the Commonwealth of Virginia

By: Philip A. Shucet  
Commonwealth Transportation Commissioner

Signature on file at VDOT Central Office

**FLUOR ENTERPRISES, INC.,**  
a California corporation

By: Herbert Morgan  
Vice President

Signature on file at VDOT Central Office

**TRANSURBAN (USA) INC.,**  
a Delaware corporation

By: Michael Kulper  
Its Attorney In Fact

Signature on file at VDOT Central Office